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In the Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH, AND HEE-SOO JUNG, PRESIDING BISHOP, PETITIONERS

v.

VILLAGE OF LONG GROVE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a land-use regulation must make religious uses or practices "effectively impracticable" to constitute a "substantial burden" on religious exercise for purposes of the Religious Land Use and Institutionalized Persons Act or the Free Exercise Clause?

2. Whether a land-use regulation that treats religious uses differently from nonreligious uses can escape RLUIPA's "equal terms" requirement, even when the two uses create comparable community impacts, simply because the land-use authority has chosen to subject religious uses to a different legal regime?

3. Whether an equal protection challenge to a land-use regulation that interferes with uses protected by the First Amendment, such as religious uses, must be analyzed under the same minimal "rational basis" scrutiny as economic regulations implicating no fundamental rights?

PARTIES TO THE PROCEEDINGS

Petitioner Vision Church, United Methodist was the plaintiff-appellant in the court below. Petitioner the Northern Illinois Conference of the United Methodist Church and Hee-Soo Jung, its Presiding Bishop, were intervenor-appellants below. Respondent the Village of Long Grove was the defendant-appellee below. There are no other parties.

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U.S. Department of Justice, *Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001-2006* (2007) (http://www.firstfreedom.gov/-report/report.pdf) 28

Roman P. Storzer & Anthony R. Picarello, Jr., The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 Geo. Mason L. Rev. 929 (2001) 28

INTRODUCTION

This case gives the Court an opportunity to address conflicts and tensions among the courts of appeals on three important questions of statutory and constitutional interpretation involving religious land use. The first involves the meaning of "substantial burden"—a critical term in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), which Congress passed unanimously, and which is of great importance to the federal government's own efforts to protect civil liberties today. The second question involves the interpretation of the "equal terms" provision in RLUIPA. And the third focuses on the level of equal protection scrutiny that courts must apply to land-use regulations that interfere with religious exercise. Because religious communities regularly experience unequal treatment at the hands of municipal governments—discrimination vividly on display in this case—all three questions are of enormous practical importance to thousands of religious congregations nationwide, and to the governments that regulate their use of land.

OPINIONS BELOW

The opinion of the district court, as amended, is reprinted in the appendix to this petition ("Pet. App.") at 1a-29a, and is reported at 397 F. Supp. 2d 917 (N.D. Ill. 2005). The Seventh Circuit's opinion affirming the decision of the district court (Pet. App. 30a-78a) is reported at 468 F.3d 975 (7th Cir. 2006). The Seventh Circuit's order denying rehearing *en banc* (Pet. App. 79a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on November 7, 2006, and the order of the court of appeals denying petitioners' petition for rehearing *en banc* was entered on January 10, 2007. By order of March 20, 2007, this Court granted petitioners' request for an extension of time

until May 10, 2007, within which to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

This petition involves not only the First and Fourteenth Amendments, but also Section 2 of RLUIPA. The relevant portions of Section 2 provide that:

> (1) "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution . . . is in furtherance of a compelling governmental interest . . . and . . . is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000cc(a)(1), and
>
> (2) "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," *id.* § 2000cc(b)(1).

STATEMENT

Vision Church, United Methodist ("Vision"), is a Korean-American congregation located in suburban Chicago. Organized more than 25 years ago on Chicago's north side, by 1999 Vision had outgrown its building, and most of its 300 members had moved to suburban Lake County, Illinois. Under the leadership of its pastor, Rev. Soon-Chang Jang, Vision undertook a building campaign and hoped to build a new church in the Village of Long Grove, an 18-square-mile village of suburban estate homes, forest areas, and farmland located in Lake County. Jang met several times with Long Grove's City Manager to discuss Vision's interest in finding property. The Manager advised Jang that Long Grove would not permit construction of a church

on the first two properties they discussed, and the owners of a third refused to sell. Eventually, the Manager and Jang agreed on a fourth property, which the Manager said was "the best place to build a church in Long Grove." Vision purchased that parcel, nearly 30 acres of vacant land in unincorporated Lake County adjoining Long Grove. The parcel was surrounded on two sides by farmland, on a third by homes on five-acre lots, and on a fourth (across a county highway) by a complex housing two public schools.

Vision's Application to Long Grove. The Manager told Jang to submit a long-range plan describing all the development Vision might wish to make on the property. Vision complied, and sought to have the property annexed into the Village. Although Vision had an absolute right, under Lake County's permissive zoning laws, to build a church *outside* the Village, Vision hoped to become a more integral part of the Village and believed annexation would further that goal. Along with its application for annexation, Vision asked that its land be zoned as "residential" and sought a special use permit—both requirements for building a church anywhere in Long Grove.

In all material respects (except for being much smaller), Vision's special use proposal was identical to proposals filed by the local school district for an enormous school complex across the street from Vision's land. Less than one year before Vision bought its property, the school district built a 172,000 square-foot structure that houses a middle school and an elementary school and serves over 1,000 students. Like Vision, the school district had approached Long Grove for annexation, residential zoning, and a special use permit. Long Grove promptly, unanimously, and without a hearing granted all three requests. The school complex is the largest structure in Long Grove. — See Pet. App. 84a (aerial photograph of Vision land and school complex). It includes 377,802 square feet of impervious surfaces (buildings, paved parking, and sidewalks) on 73 acres, for an impervious surface ratio of 11.9%.

Because the Long Grove Zoning Ordinance had no zone in which houses of worship were a permitted use, Vision had to go through the Village's special use permit process. That process gave the Village discretion to grant or deny a permit on virtually any ground, including "public convenience"; "public welfare"; "injury to the value of other property"; conformity with "applicable regulations of the district"; and ability "to complete the project as proposed . . . to the satisfaction of the village." Pet. App. 82a

As the Manager had advised, Vision's proposal represented its long-term goals. Although the plan, if completed, would have produced extensive facilities, those facilities would have remained far smaller than the facilities located on the school property across the street. The Vision plan included a 1,200-seat main sanctuary, an education and administration building, a youth sanctuary and day-care building, a small chapel, a fellowship building with basketball courts, a missionary retreat building, a custodial residence, an outdoor amphitheater, a fountain, a combined soccer/softball athletic field, tennis courts, and parking for approximately 400 vehicles.

The plan complied with every measurable standard in the Village's zoning ordinance, including all density, safety, drainage, setback, and other requirements. The buildings would occupy a maximum of 99,000 square feet with a total of 123,483 square feet of impervious surfaces (buildings, parking, and sidewalks) on 27 acres, for an impervious surface ratio of 10.3%—less than the 11.9% approved for the school complex, and far less than the 40% permitted under the zoning ordinance. Pl.'s Mot. Summ. J., Am. Stmt. of Facts, p. 16, ¶ 69.

During public hearings on Vision's proposal, it became clear that Vision, a Korean-American congregation, and its plan were viewed by local residents with suspicion and hostility, and some remarks had racial overtones. In the end, the Village imposed a series of some *fifty* conditions on approval, including that Vision:

- be more like a "nice traditional country church";
- reduce the size of the church to "one like Commissioner Walter attends";
- devote 85% of the property to open space (25% more than the Village zoning ordinance required);
- remove the playing field, youth sanctuary, and day care center;
- reduce the sanctuary seating, first to 1,000, then to 600, and then to 500;
- reduce parking spaces from 400 to 240;
- reduce the impervious surfaces (parking, roofs, sidewalks, other paving) from 175,408 square feet to 59,000 square feet; and
- remove the chapel, fountain, and outdoor amphitheater and replace them with a "meditation rock."

Pl.'s Mot. Summ. J., Book of Exs., Tabs 22, 56-57 ("Tab").

Reluctantly, Vision agreed to meet all of these conditions and many more. It also agreed, at Long Grove's request, to reduce the size of its original proposal from 99,000 square feet of floor space with 123,483 square feet of impervious surfaces, to 56,200 square feet of floor space with 80,683 square feet of impervious surfaces. This reduced the impervious surface ratio from 10.3% to 6.75%, again far less than either the schools (11.9%) or the maximum permissible under the zoning ordinance (40%). The only conditions that Vision did *not* agree to were:

- that Vision grant the Village an easement prohibiting all "future structures or impervious parking" on Vision's property;
- that a playing field that Vision intended to use for its youth outreach be marked "Natural Landscaped Area . . . and no organized outside activities . . . be allowed in the area"; and, most importantly,
- that "[o]nly two services [be held] on Sunday or holidays[,] except weddings and funerals, [a]nd no more than one major activity each week Monday through

> Friday except weddings and funerals"; and that "[a]ll other major activities or special events other than those listed as part of the regular activities and programs . . . shall require Village Board approval."

Pet. App. 33a-34a; Tabs 56-57.

Despite Vision's many concessions, and without making any findings after six heated public hearings, the Village denied Vision's permit application. *Id.* at 34a.

Long Grove's Forcible Annexation and Rezoning of Vision's Property. While Vision's first application to Long Grove was still pending, Vision also applied for a building permit under Lake County's permissive zoning regime. In 2001, Lake County informed Long Grove of the pending approval of Vision's permit application.

The Village interrupted that process, however, by reversing its prior stance and forcibly annexing and rezoning Vision's land. When the Village rejected Vision's initial petition, it knew that Lake County's rules allowed churches to locate anywhere and that it could not, without annexation, stop Vision from building. As the Village planner wrote to the Manager and the Plan Commission, "[Vision's] land is not in the Village, and the Village must annex to have any significant control." Tab 69.

Thus, in a turnabout requiring several elaborate steps, Long Grove forcibly annexed and rezoned Vision's property. First, because Illinois law allows forcible annexation only if the property is surrounded by property within a municipality's corporate boundaries, 65 ILCS 5/7-1-13, the Village had to annex all of the non-Village land surrounding Vision. This land consisted of a large, 120-acre tract (more than four times the size of Vision's property) owned by a private developer. The city fast-tracked approval of this annexation and "residential" rezoning, effectively opening the door for development of 120 acres of previously vacant land behind Vision's property.

Second, without informing Vision of its plans, Long Grove passed an ordinance forcibly annexing Vision's

property. This had the effect of cutting off Vision's petition to Lake County for a building permit, because the County no longer had jurisdiction over the matter. When the Village annexed Vision, Vision was roughly *two weeks* away from site plan approval by Lake County. Tab 64 at 18-19. Finally, the Village rezoned Vision's property as "residential"—and thereby ensured that a special use permit would be required for construction of any church.

Having thus been brought under Long Grove's authority and foreclosed from building its church, as was its right under Lake County's zoning regime, Vision reapplied to Long Grove for a special use permit similar to its original proposal. Pet. App. 37a.

The Assembly Ordinance. After forcibly annexing and rezoning Vision's property, and shortly after Vision had reapplied for a special use permit, Long Grove enacted an ordinance (the "Assembly Ordinance" or "Ordinance") restricting the size and capacity of buildings used for "public assembly." The buildings covered by the Ordinance were "religious institutions, aquariums, libraries, museums, private schools, and other similar uses," although the only use Long Grove ever investigated was that of religious institutions. The Ordinance provided that a complex made up of three or more buildings and located on 15 or more acres could not exceed 55,000 square feet—unless it fronted a state highway. The Ordinance did not cover public schools.

According to the Village planner, Long Grove specifically *targeted* the Ordinance at Vision. For example, the planner circulated a memorandum showing that an early draft of the Ordinance left Vision room to expand. To remedy this "shortcoming," the next draft limited building space for a community facility to 55,000 square-feet, just under the 56,200 square-feet that Vision previously proposed. The revised ordinance, which ultimately was enacted, also required that any non-profit public assembly building in excess of 55,000 square feet front on a state

highway. Vision fronts on a county road. Pet. App. 36a, 83a.

In July 2002, without giving any reasons, but presumably on the basis of the newly enacted Ordinance, the Village unanimously rejected Vision's application.

Because of Long Grove's actions, by 2003 Vision had spent three years without the use of its property and without the ability to fully serve its members and the community. Instead of growing to more than 500 members, as projected, Vision's congregation dropped from 300 to 120. Appellant's Br., Short App. at 112. As a result, Vision's revenues also dropped, and more than 15 different ministries were cancelled or severely curtailed. *Id.* at 70-73. Because of the delay, the cost of building Vision's church increased by several hundred thousand dollars. And Vision incurred over $400,000 in expenses in the multiple zoning proceedings before Long Grove and Lake County. Vision's land stands empty today.

Court Proceedings. After more than three years of rule changes, resistance, and rejection, Vision filed suit alleging, among other things, violations of RLUIPA, the Free Exercise Clause, and the Equal Protection Clause. Invoking RLUIPA's "substantial burden" provision, Vision argued that it was substantially burdened by the more than 50 conditions the Village placed on its special use permit, by three years of delay and uncertainty, by more than $400,000 spent in multiple zoning proceedings, by the forcible annexation and rezoning of its property, and by passage of the Ordinance targeting its development efforts. Vision also argued that the Village violated RLUIPA by treating it on "less than equal terms" than the massive public school complex across the street, and violated the Equal Protection Clause by passing the Ordinance and denying Vision a special use permit in circumstances in which such permits had been granted to others.

The district court granted summary judgment to the

Village on all claims. The court reasoned that Vision did not face a substantial burden because it could have submitted a new application complying with the Ordinance's size restrictions. Pet. App. 19a. The court concluded that Vision failed to establish an equal terms claim because it failed to identify a nonreligious group that had received more favorable treatment. And on the equal protection claim, the court reasoned that the Ordinance was subject only to rational basis review—because it was "facially neutral and generally applicable"—and that it was rationally related to the Village's "stated planning goals . . . for a quiet countryside, with an unhurried environment where families can enjoy the open space." *Id.* at 24a.

The Seventh Circuit affirmed. Consistent with its precedent, the Court defined "substantial burden" as one that "bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—*effectively impracticable*." *Id.* at 62a-63a (emphasis added). The court concluded that none of the burdens alleged by Vision met this standard.

Specifically, the Court held that the size restriction was not a substantial burden because a 55,000 square-foot facility could accommodate Vision's then-current complement of 120 members. *Id.* at 67a-68a. The court rejected Vision's claims based on delay, expense, and general uncertainty on similar grounds. *Id.* at 63a-64a n.22. And although the court acknowledged that the restrictions on the number and types of religious services were "more troublesome," it concluded that they were insignificant because in its view the Assembly Ordinance, not the restrictions on services, were the *final* grounds for Vision's denial. *Id.* at 66a.[1] In so concluding, the Court simply as-

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[1] According to the Court, the forcible annexation was irrelevant under RLUIPA because it was not a "land use regulation," which

sumed that Vision would have received approval for a 55,000-square foot complex, even though the Village had just denied Vision's 56,200-square foot proposal (2% larger), and even though the Village retained discretion under the Assembly Ordinance to reject a smaller proposal on the grounds of "public convenience," "public welfare," "injury to the value of other property in the neighborhood," and ability "to complete the project as proposed . . . to the satisfaction of the village." *Id.* at 82a.

On the equal terms claim, the Court held that because the Village had approved the school complex *before* adopting the Ordinance, "Vision and the elementary schools were subject to different standards," and thus there was no unequal treatment under RLUIPA. *Id.* at 74a.

On the equal protection claim, the Court applied bare rational basis scrutiny. The court declared that "Vision must demonstrate [1] governmental action wholly impossible to relate to legitimate governmental objectives," *and* "[2] malicious conduct . . . or conduct that evidences a spiteful effort to 'get' [Vision] for reasons wholly unrelated to any legitimate state objective." Pet. App. 70a (quotation omitted). Applying this standard, the Court held that the Village acted rationally in granting the adjacent schools' special use permit while denying Vision's. "At the time that Village addressed Vision's special use application," the Court stated, "it already had passed the Assembly Or-

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RLUIPA defines as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." *Id.* 64a (quoting 42 U.S.C. § 2000cc-5(5)). Assuming *arguendo* that annexation is not itself "land use regulation," the subsequent rezoning and application of the Village zoning ordinance are certainly land use regulations, and the Seventh Circuit simply ignored these. Moreover, the Seventh Circuit "collapse[d]" its RLUIPA and free exercise analysis, ignoring the fact that the Free Exercise Clause is not limited by RLUIPA's definition of "land use regulation." *Id.* at 61a-62a.

dinance." *Id.* at 71a-72a. Thus, "to deny Vision's application because it failed to submit plans that complied with these restrictions is rationally related to the goals reflected in the Assembly Ordinance." *Id.* at 72a.

REASONS FOR GRANTING THE PETITION

Since *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), federal and state courts have decided hundreds of suits by synagogues, churches, or mosques challenging municipal zoning laws and decisions. This case presents critical statutory and constitutional questions that arise in many such cases and on which the courts of appeals (and at least one state supreme court) are divided. These conflicts and tensions reflect fundamental disagreements over the proper interpretation of RLUIPA and this Court's constitutional decisions, and the uncertainty these conflicts create has an enormous practical impact on churches and local governments throughout the Nation. The issues presented also implicate the long-standing federal policy, reflected in RLUIPA itself, of reducing religious discrimination by local governments—governments that are sometimes more responsive to the biases of local majorities than to the ideal of tolerance for minorities reflected in the First and Fourteenth Amendments.

I. Review Is Needed To Resolve A Circuit Conflict Over The Standard For Determining When A Law Imposes A "Substantial Burden" On Religious Exercise.

The Seventh Circuit's opinion on the meaning of "substantial burden" widens an existing conflict between those courts of appeals that, like the Seventh Circuit, require a showing that religious practice was made "effectively impracticable" and those that merely require a showing that religious practice was made significantly more difficult. This Court's guidance is badly needed to resolve this important question of federal law, which arises frequently in

the application not only of RLUIPA, but also of the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* This Court has never provided guidance on the meaning of "substantial burden" in the land-use context, and the circuit courts have developed widely varying definitions based on a pair of 25-year-old employment decisions from this Court.

1. The decision below deepens a square circuit conflict on this important question. On the one hand, following earlier Seventh Circuit RLUIPA precedents and Second Circuit decisions interpreting the Free Exercise Clause (which provided the forerunner for the RLUIPA standard), the court below set an extraordinarily high threshold for finding that government action substantially burdens religion. It defined "substantial burden" as a burden that "bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—*effectively impracticable*." Pet. App. 62a-63a (emphasis added).[2] Vision, like every other religious group to which the Seventh Circuit or any district court has applied this test, failed to establish a substantial burden. According to the court, "Vision was free to submit

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[2] This is essentially identical to the Second Circuit's standard under the Free Exercise Clause. Reasoning that the "central question in identifying an unconstitutional burden is whether the claimant has been *denied the ability* to practice his religion or coerced in the nature of those practices," a panel of that court concluded that there can be no "substantial burden" absent "coercion in religious practice, or the Church's *inability* to carry out its religious mission in its existing facilities." *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (emphasis added). Accordingly, even though the landmarking law at issue in *Rector, Wardens & Vestry* "drastically restricted [a] Church's ability to raise revenues to carry out its various charitable and ministerial programs" by building an office tower, no substantial burden was shown.

modified plans to the Board" that "could have" satisfied the Board, and therefore the Board had not rendered Vision's religious exercise impossible. Pet. App. 69a (citing *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 386 F.3d 183, 188 (2d Cir. 2004)).

In contrast to this stringent approach, several circuits (and at least one state supreme court) have taken a more moderate view. These courts have recognized that burdens fall along a continuum between those that make a religious practice virtually impossible and those that are merely trivial inconveniences, and that middle-ground obstacles may constitute "substantial burdens" on religion for purposes of RLUIPA, just as more extreme burdens do.

Most significantly, the Eleventh and Ninth Circuits have explicitly repudiated the Seventh Circuit's definition of "substantial burden." See *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("declin[ing] to adopt [that] definition"); *Guru Nanak Sikh Soc'y* v. *County of Sutter*, 456 F.3d 978, 989 n. 12 (9th Cir. 2006). Looking to this Court's *Sherbert* line of cases (see *infra* at 17-18) the Eleventh Circuit has held that a substantial burden merely "requires something more than an incidental effect on religious exercise," such as "pressure that tends to force adherents to forgo religious precepts." 366 F.3d at 1277. Indeed, the court in *Midrash Sephardi* openly criticized the Seventh Circuit's rule as "render[ing] [RLUIPA's] total exclusion prohibition meaningless." *Ibid.*

Similarly, the Ninth Circuit, drawing on dictionary definitions of "substantial" and "burden," has held that a substantial burden is one that is "'oppressive' to a 'significantly great' extent," or "impose[s] a significantly great restriction or onus upon [religious] exercise." *Guru Nanak*, 456 F.3d at 988-989 (quotation omitted). The court expressly acknowledged that such a definition of substantial burden is "more lenient" than the Seventh Circuit's "narrower definition of that phrase." *Id.* at 989 n.12.

Numerous other courts have adopted definitions of "substantial burden" that conflict with the Seventh Circuit's. Because those courts addressed the "substantial burden" inquiry before the Seventh Circuit adopted its restrictive definition, however, they did not have the opportunity to repudiate it expressly. See, *e.g.*, *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (concluding that a substantial burden is one that has a "*tendency* to coerce individuals into acting contrary to their religious beliefs," or one that "significantly inhibit[s] or constrain[s]," "meaningfully curtail[s]," or denies "reasonable opportunities" for religious practice) (emphasis added; internal quotations omitted); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 184 (Wash. 1992) (concluding that where government action "grossly diminishes the value of the Church's principal asset," it "impermissibly burdens [the] right to free exercise of religion" even if it does not make religious observance impossible or impracticable).

2. Not surprisingly, these conflicting definitions have produced directly conflicting results. A prime example is the square conflict between this case and the Ninth Circuit's recent decision in *Guru Nanak*. There the plaintiff, a Sikh religious group, sought a conditional use permit for construction of a Sikh temple on property zoned for low-density residential use. The county planning commission denied the permit based on concerns about increased noise and traffic in the residential neighborhood. 456 F.3d at 982. Guru Nanak then purchased a larger parcel in a rural area zoned for agricultural use and sought a permit for a temple roughly half the size it had previously proposed. *Ibid.* The county attached a number of conditions, including requirements that Guru Nanak include a 25 foot, undeveloped buffer on the north side of the property, keep all ceremonies indoors, and incorporate landscaping. Guru Nanak agreed, but the county again denied its permit application, this time on the ground that the proposed tem-

ple's separation from existing infrastructure could contribute to "leapfrog development." *Id.* at 984.

Expressly rejecting the Seventh Circuit's restrictive "effectively impracticable" test, the Ninth Circuit held that the county had imposed a substantial burden even though it left Guru Nanak free to practice its religion. That was because "[t]he net effect of the County's two denials"—especially in light of the broad reasons given for the denials—"is to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve." *Id.* at 991-92. In other words, the County had imposed a substantial burden, not because of any impossibility, but because "any future [conditional use permit] applications . . . would be fraught with uncertainty." *Id.* at 990-991.

The result in *Guru Nanak* starkly conflicts with the result below. Vision faced easily as much (if not more) uncertainty as to whether future permit applications would be successful. The only difference is that in *Guru Nanak*, the source of the uncertainty was the County's vague reasons for the permit denials, whereas here the source of uncertainty was overtly hostile maneuvering by the Village—specifically, conditions that pressured Vision to give up core religious practices and the specially targeted Assembly Ordinance passed in the wake of a forcible annexation. These aggressive actions demonstrate the Village's apparent resolve to prevent Vision from ever making a successful permit application. And even if Vision had offered to comply with every new rule concocted by the Village, the Village would *still* have retained discretion to reject the application based on malleable grounds such as "public convenience," "public welfare," or ability "to complete the project as proposed . . . to the satisfaction of the village." Pet. App. 82a (LGZO § 5-11-17(E)). In light of these vague standards, combined with the Village's openly hostile ma-

neuvering and exceedingly broad discretion, Vision's "future [permit] applications" were "fraught with uncertainty" *at least as great* as that faced by Guru Nanak. 456 F.3d at 990-991.[3]

Accordingly, under the Ninth Circuit's application of the term, Vision faced a "substantial burden" on its exercise of religion. And under the Seventh Circuit's "effectively impracticable" test, the burden at issue in *Guru Nanak* would *not* be considered substantial.

Another example of direct conflict is the Fifth Circuit's decision in *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988). There, the question was whether a city's denial of a special use permit for a mosque placed an undue burden on the religious exercise of a Muslim university group. Although the city claimed that it denied the permit "because of concerns about traffic congestion," and that the group could locate as a matter of right elsewhere in the city or in the adjacent county, the court held that the permit denial "ma[de] a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, [thereby] burden[ing] their exercise of religion." *Id.* at 298-99. Vi-

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[3] In other respects too, Vision faced a greater burden than did Guru Nanak. For example, Vision faced conditions on its permit application that were both more onerous and more numerous than those in the Ninth Circuit case. And here the Village went so far as to dictate the number and type of religious services Vision could conduct at its proposed facility and required Vision to seek Village approval for "all other major activities or special events." Tabs 56-57. Thus, Vision was put to the choice, on the one hand, of submitting its core religious practices to direct Village oversight, and on the other, risking the entire permitting process, in which it had already invested years of time and hundreds of thousands of dollars. This is the very type of Hobson's choice this Court has held to be a substantial burden on religious exercise. See *infra* at 18-19 (discussing *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981)).

sion—which has faced outright hostility from the Village, years of delay and expense, multiple permit denials, and multiple rule changes—has faced a significantly greater burden on its exercise of religion than the university group in *Islamic Center*. Thus, the Fifth Circuit's approach also conflicts directly with that of the Seventh Circuit.

3. The Seventh Circuit's approach also conflicts in principle with this Court's own "substantial burden" decisions—*Sherbert* v. *Verner* 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981)—which are the basis for the "substantial burden" standards in RLUIPA and RFRA, 42 U.S.C. § 2000bb-1, and which still apply to certain free exercise claims after *Employment Division* v. *Smith*, 494 U.S. 872, 884 (1990), including the free exercise claim in this case.[4]

A review of *Sherbert* is instructive because it did not involve government action that even approached making religious practice effectively impracticable, as the Seventh and Second Circuits would require. Instead, it involved a simple denial of unemployment benefits to a Sabbatarian who was fired for refusing to work on Saturday. 374 U.S. at 399-400. Yet this Court squarely rejected the argument

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[4] The zoning ordinance and system of special use permits at issue here fall within the "individualized exemptions" category recognized in *Smith* and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), under which strict scrutiny review applies to any law that "represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S at 884). See *First Covenant Church*, 840 P.2d at 181 (holding that land-use ordinances that "contain mechanisms for individualized exceptions" and "invite individualized assessments" are not generally applicable and require strict scrutiny); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (holding that a system in which exemptions are given for secular reasons, but not extended for religious reasons, "must survive heightened scrutiny").

that a financial expense resulting from loss of a government "benefit or privilege" was not a "substantial burden." Instead, this Court observed that even "conditions and qualifications upon governmental privileges and benefits" frequently "have been invalidated because of their *tendency to inhibit* constitutionally protected activity." *Id.* at 406 & n.6 (emphasis added). That is, the substantial burden requirement meant not that the plaintiff must show that the regulation made her religious observance "effectively impracticable," but simply that the rule put "pressure upon her to forgo [a religious] practice." *Id.* at 404.

The same was true in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), another case involving the denial of unemployment benefits to an individual who balked at performing work duties that conflicted with his religious beliefs. The Court held that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* at 717-18. And even though, in such circumstances, "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718.

This type of burden—pressure to modify behavior because the government conditions an important benefit on forgoing religiously mandated conduct—is precisely what Vision faced when the Village conditioned approval of its special use permit on Vision's cutting back the number and types of religious activities and conducting others only with Village approval. This pressure alone—quite apart from the years of delay and expense and the outright hostility—is sufficient to establish a substantial burden under *Sherbert* and *Thomas*. But the Seventh Circuit, while acknowledging that this pressure was "troublesome," Pet. App. 66a, nevertheless refused to find a substantial bur-

den because the Village did not render religious exercise *impossible*.[5] This holding thus presents a significant conflict in principle with *Sherbert* and *Thomas*.

In sum, the Seventh Circuit's "effectively impracticable" standard departs sharply from the approach taken by a number of circuit and state courts and from this Court's traditional understanding of "substantial burden." This Court's review is needed to clear up this confusion and to provide the protection that Congress enacted in RLUIPA.

II. Review Is Needed To Provide Guidance On When A Regulation Treats A Religious Use On "Less Than Equal Terms" Than A Nonreligious Use.

This case also provides the Court with an opportunity to resolve substantial tension between decisions of the Seventh and Eleventh Circuits interpreting RLUIPA's equal terms provision. That provision makes it unlawful to "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

1. Vision argued below that the Village treated it on "less than equal terms" by, among other things, approving the similarly situated (and much larger) school complex across the street. The Seventh Circuit, however, concluded that Vision and the schools were not similarly situ-

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[5] The Seventh Circuit's standard also requires that a land use regulation "necessarily bears *direct, primary, and fundamental* responsibility for rendering religious exercise. . . . effectively impracticable." Pet. App. 62a-63a (emphasis added). But *Sherbert* and *Thomas* held that governmental action can substantially burden religion even when the burden is "only indirect." *Sherbert*, 374 U.S. at 404; see also *Thomas*, 450 U.S. at 718 ("While the compulsion *may be indirect*, the infringement upon free exercise is *nonetheless substantial*") (emphasis added). The Seventh Circuit ignored these precedents as well.

ated because Vision, unlike the schools, was subject to the Ordinance: "the fact that Vision and the elementary schools were *subject to different standards* because of the year in which their special use applications were considered compels the conclusion that there was no unequal treatment." Pet. App. 74a (emphasis added).

But the fact that Vision and the public schools were "subject to different standards" is not an appropriate ground for distinguishing the two—rather, it is precisely the type of unequal treatment that RLUIPA prohibits. RLUIPA requires the court to point to a factual difference between religious and nonreligious assemblies—a difference in "community impact"—that would justify differential legal treatment. *Konikov* v. *Orange County*, 410 F.3d 1317, 1327 (11th Cir. 2005) (examining the factual record and determining that differential treatment was not justified because assemblies had a "comparable community impact") (emphasis omitted).

If, as the Seventh Circuit concluded, a different legal standard is its own justification for different treatment, RLUIPA's equal terms provision is practically meaningless. In that case, a land-use authority can always escape that requirement simply by adopting a new legal standard tailor-made for the religious use at issue.

2. The Seventh Circuit's interpretation is in significant tension with the Eleventh Circuit's approach (and results) in *Konikov* and *Midrash*. In *Konikov*, a rabbi challenged the application of a municipal zoning ordinance requiring religious and social organizations located in a particular district to apply for a special permit. Although on its face the ordinance treated religious and nonreligious organizations equally, in practice the city required religious groups, but not social groups, to obtain a permit. The Eleventh Circuit held that treating groups with "comparable community impact" differently, even under a facially neutral ordinance, violated RLUIPA. *Ibid.*

This is precisely what the Village did here. Both Vision and the school district applied for annexation, rezoning, and a special use permit in order to begin their building projects. The city approved the school district's application, but denied Vision's, even though it was uncontested that the public school complex would have a much larger "community impact" than the church. This constitutes treatment on "less than equal terms" under the Eleventh Circuit's analysis in *Konikov*.[6]

Although the Eleventh Circuit has not squarely repudiated the Seventh Circuit's view that a land-use authority can escape the equal terms requirement by subjecting religious and non-religious uses to different legal regimes, any such notion is plainly inconsistent in principle with the Eleventh Circuit's "comparable impacts" analysis. Only this Court can resolve this disagreement between two circuits governing substantial portions of the Nation.

III. Review Is Needed To Clarify The Standard For Assessing Equal Protection Challenges To Laws That Discriminate Against And Among Religious Uses.

This case also provides the Court with an opportunity to resolve a circuit conflict on a significant open question in this Court's equal protection jurisprudence after *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985).

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[6] The decision below also stands in tension with the Eleventh Circuit's decision in *Midrash*. There, the court held that a zoning ordinance permitting private clubs and lodges in business districts, but excluding religious assemblies, violates RLUIPA's equal terms provision. 366 F.3d at 1231. Here, similarly, the Village freely permits restaurants, tearooms, taverns, and health clubs in one zoning district, but excludes religious assemblies as permitted uses in all districts. Moreover, the Ordinance applies to religious organizations but not to public schools. Both of these anomalies constitute treatment on "less than equal terms" under the *Midrash* analysis.

1. *Cleburne* has generated significant confusion on the question whether religious land uses—and other sensitive uses—are subject to some form of heightened scrutiny rather than true rational basis review. In *Cleburne*, the Court *said* it was applying traditional rational-basis review to a land-use restriction on homes for the mentally retarded, but, as Judge Posner has noted, actually employed a "more careful, realistic, skeptical" form of review. *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 769 (7th Cir. 2003) (Posner, J., dissenting) ("*CLUB*"). This has left the lower courts wondering: Do this Court's equal protection holdings teach that "discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities"? *Ibid.* As Judge Posner recognized in *CLUB*, the lower courts are in conflict on this critical issue. *Ibid.*

On one side of the conflict, the court below (following its earlier decision in *CLUB*) applied bare rational basis review to the Village's denial of Vision's special use application under the Assembly Ordinance: "Vision must demonstrate governmental action *wholly impossible* to relate to legitimate government objectives," the Court stated. Pet. App. 70a (emphasis added) (citation omitted). Applying this standard, the court held that the Village's actions were rational because "[a]t the time that Village addressed Vision's special use application it already had passed the Assembly Ordinance." *Id.* at 71a-72a. When Vision failed to comply with the Ordinance, the Village acted rationally—i.e., in furtherance of the Ordinance's goals—by denying Vision's application. *Ibid.*

This approach conflicts with that of the Eighth, Third, and Fourth Circuits. For example, in *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 471-472 (8th Cir. 1991), a city ordinance excluded churches from the city's central business district, but gave open access to other non-commercial entities such as Alcoholics Anonymous, the American Legion, and the Masonic Lodge. The court

held that the city had "failed to support its exclusion of the Church with any justification beyond ... conclusory statements in the affidavits of the city planners." *Ibid.* In reaching this conclusion, the court invoked *Cleburne*, not for its description of rational basis scrutiny, but for its "analysis," which "focused on whether [the use at issue] 'would threaten legitimate interests of the city in a way that other permitted uses ... would not.'" *Id.* at 471 (quoting *Cleburne*, 473 U.S. at 448). Unlike the court below, then, the Eighth Circuit "follow[ed] what the Supreme Court does and not just what it says it is doing." *CLUB*, 342 F.3d at 769 (Posner, dissenting).

Had the Seventh Circuit followed the Eighth Circuit's approach, it would have held that the Village's application of the Assembly Ordinance violated equal protection. After all, there can be no serious argument that a 99,000 square-foot church, with a total of 123,483 square feet of impervious surfaces, "threaten[s] legitimate interests" of the Village "in a way that [a] [172,000 square-foot school, with 377,802 square feet of impervious surfaces] does not." *Cleburne*, 473 U.S. at 448. The Village's forcible annexation and rezoning of Vision's property and sharp about-face on space limits bear all the hallmarks of irrationality—a conclusion verified by the Village's own admission that the Assembly Ordinance was targeted at Vision. Appellant's Br., Short App. at 48. Under *Cornerstone Bible*, the Eighth Circuit would not allow this.

Nor would the Third Circuit, which, like the Eighth Circuit, requires more than bare rational basis review. For example, in *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002), the Third Circuit considered a zoning ordinance that, much like the Assembly Ordinance and the ordinance in *Cornerstone Bible*, treated churches differently than ostensibly similar entities. *Id.* at 126-127. The court noted that this Court "has not yet directly addressed the constitutional incidents of municipal restrictions on [the] use of land by religious institutions." *Id.* at 133. But the court nevertheless observed

that, although a version of rational basis review is generally applied in cases challenging *liberty* restrictions imposed by a land-use authority, review in cases involving *religion* must be "meaningful" and alert for "animus or other improper motive." *Id.* at 133, 135.

Applying this heightened equal protection standard, the Third Circuit held that "the initial burden on the complaining party" is "to demonstrate that it is 'similarly situated' to an entity that is being treated differently . . . perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan." *Id.* at 137. To be "similarly situated," the court explained, is to be "similar in 'kind,' to the uses currently permitted." *Id.* at 125. As to the *justification* for differential treatment, the Third Circuit used a sliding scale. "Clearly, as the similarity of use wanes," the court explained, "so too the inequality in treatment will be increasingly tolerated under the law." *Id.* at 142. The court thus remanded for a finding of whether the congregation was similarly situated to another, favored entity. *Id.* at 144.

The decision below conflicts with *Kol Ami*. Here the Seventh Circuit refused even to consider whether Vision and other churches are situated similarly to schools. See Pet. App. 71a-72a. It also failed to perform any assessment of the Village's justification for the Assembly Ordinance in light of the Village's stated objectives. Instead, it *assumed* the validity of the Ordinance and assessed whether denying Vision's application was a rational way to achieve the Ordinance's goals. *Id.* at 72a. But that is tautological. Had the court below followed the Third Circuit's approach, it would have applied "meaningful review" to the Ordinance and been "alert" to the Village's arbitrary and capricious maneuvering. 309 F.3d at 135 (citing *Cleburne*, 473 U.S. at 446-447).

The decision below also conflicts with the Fourth Circuit's decision in *Marks* v. *Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989), which involved the denial of a special use permit to a palm reader. *Marks* ruled that whether the

sensitive use is a product of "'inaccurate' or 'stereotypic' fear of the mentally retarded," as in *Cleburne*, of "women," "or, as alleged here, those who practice rituals thought by some to be heretical, the rule remains the same." *Ibid.* That is, courts must probe for impermissible endorsement of unspoken bias against constitutionally protected interests. And under *Cleburne*, "denial of a permit is arbitrary where the decision to deny was not related to any substantial zoning interest, but was instead motivated principally by the heavy opposition of neighbors expressed at a public hearing." 883 F.2d at 311 n.3 (citation, quotations, alterations omitted).

That is what occurred here. Following unusually heated public hearings, with hostility from local residents and even comments with racial overtones, the Village placed some 50 conditions on Vision's proposal for annexation. Some of these were "poison pills," such as limiting the number and type of weekly services Vision could hold and requiring Vision to ask the Village for permission to hold extra services. Others were onerous and invasive, such as requiring 85% of the property to be devoted to open space (25% more than the Village zoning ordinance required) and removing the playing field, youth sanctuary, and day care facility—effectively eliminating Vision's plans for a small religious pre-school. Still other requirements were ambiguous but arguably rooted in religious prejudice—most dramatically, the demand that Vision make its building more like a "nice traditional country church." Then, after forcibly annexing and rezoning Vision's land just two weeks before Vision's plan would become eligible for approval by Lake County, the Village enacted the Assembly Ordinance obviously designed to render Vision's smallest proposal not quite small enough. This litany of discrimination is the sort of situation that cries out for the more careful review commended in *Marks*, *Kol Ami*, *Cornerstone Bible*, and Judge Posner's dissent in *CLUB*, rather than the bare rational basis review applied below.

2. The Seventh Circuit's standard also stands in significant tension with *Cleburne* itself, as Judge Posner pointed out. To be sure, the say-one-thing-and-do-another approach in *Cleburne* makes it difficult ever to say a decision actually "conflicts" with *Cleburne*. That is why there is so much confusion and division among the lower courts. Nevertheless, the question "clearly posed" in *Cleburne* is the same as the question posed by the Assembly Ordinance here: "may the [Village] require [a] permit for this facility when other [comparable] facilities are freely permitted." 473 U.S. at 448. And in *Cleburne*, whatever *label* the Court gave to its analysis, the Court answered that question by weighing each of the city's proffered justifications, including the city's argument that its "ordinance is aimed at avoiding concentration of the population and at lessening congestion of the streets." *Id.* at 450. The Court rejected this argument because it failed to explain why similar types of group homes and health facilities could locate in the area without a permit. *Ibid.*

Application of these principles likewise requires rejection of the justifications offered by the Village below. It has never explained why a major public schools complex—located *across the street* from Vision—received discretionary approval to locate in the Village while Vision did not. Nor has the Village ever explained why Vision had to satisfy 50 conditions for annexation, including severe limitations on the type and number of services, when the school district did not. Under any fair application of *Cleburne*, the Village's failure to provide a reasoned explanation for these differences renders its actions unconstitutional. The decision below thus conflicts in principle with *Cleburne*.

Only this Court can clear up the lower courts' confusion about the meaning of *Cleburne* and its proper application to religious land-use issues. This case provides an excellent opportunity to do just that.

IV. The Questions Are Of Immense Practical Importance To Churches, Local Governments, and Federal Policy.

The practical importance of the questions presented also militates strongly in favor of review. Simply put, zoning conflicts between churches and local governments have become one of the most important—if not *the* most important—church-state issue of our time.

1. Before passing RLUIPA, Congress assembled "massive evidence" of a nationwide problem in which "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy) ("Joint Statement"). Hearings provided "a substantial record of evidence indicating a widespread pattern of religious discrimination in land-use regulation"—discrimination that especially disfavors minorities, such as the Korean American congregation affected by the Village's actions here. H.R. Rep. No. 106-219, at 18 (1999).

Religious communities, moreover, are often *deliberately* burdened by "brash display[s] of religious discrimination." H.R. Rep. No. 106-219, at 22 (1999). In one notorious case, zoning officials required a new Orthodox synagogue to include in its building plan a large number of parking spaces, even though members of the synagogue—like many observant Jews—walked to services. Once the synagogue agreed to construct the unneeded parking spaces, the city denied the permit anyway, citing traffic problems associated with the number of cars for which the parking lot was designed. See *Orthodox Minhan* v. *Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772, 773 (Pa. Commw. Ct. 1989), cited in H.R. Rep. No. 106-219, at 23 & n.109. Congressional testimony established that such dis-

crimination was not isolated but rather was a nationwide problem. Joint Statement at S7775; H.R. Rep. 106-219, at 24 ("Conflicts between religious organizations and land use regulators are much more common than reported cases would indicate").

Such practical considerations provide an additional, powerful reason for plenary review. Indeed, protecting minority religions from discrimination in the land-use context has been an important federal policy ever since RLUIPA's passage and is actively pursued by the United States Department of Justice today.[7]

2. That policy reflects the reality that land-use issues are often at the heart of religious freedom. In most religious traditions, a place to gather, worship, and perform religious ministries is indispensable to religious exercise. "The physical embodiment of a faith group—its church—represents its ability to speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 945 (2001).

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[7] The Department has launched a special initiative to protect religious freedom by, among other things, vigorously enforcing RLUIPA. From 2001-2006, the Department reviewed 118 RLUIPA matters, filed four of its own lawsuits under RLUIPA, filed eight amicus briefs in federal appellate cases involving RLUIPA, and intervened to defend RLUIPA's constitutionality 29 times. U.S. Department of Justice, *Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001-2006* 25-29 (2007) (available online at http://www.firstfreedom.gov/-report/report.pdf). Indeed, the Department has been actively involved in many of the cases cited in this petition, and filed amicus briefs supporting the results in *Guru Nanak* and *Midrash*, the two cases that explicitly rejected the Seventh Circuit's definition of "substantial burden." *Ibid*

Indeed, as Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." Joint Statement at S7774. Accordingly, land-use constraints on religious meeting spaces often impose severe religious hardships.

Even where those constraints do not make religious practice impossible—as the Seventh Circuit requires—they often create substantial burdens. For example, inadequate seating inevitably forces some adherents to stand in foyers and hallways, precluding direct participation in worship services. Evangelism and outreach are severely hampered when there is no room for new members. Religious teaching and counseling suffer when there is no space for contemplation or instruction.

Similarly, the design and arrangement of a religious space is "freighted with religious meaning," with certain liturgies requiring particular building designs. *First Covenant Church*, 840 P.2d at 182. Features such as the sanctuary, altar, steeple, counseling rooms, and classrooms may all be critical to religious practice yet be substantially affected or impeded by zoning regimes.

3. Finally, a decision by this Court definitively establishing the legal standards by which land-use decisions are to be judged under RLUIPA and the First Amendment will very likely reduce the litigation burdens on both religious bodies and local governments. Uncertainty in any area of the law breeds litigation. And that is particularly true in this area, which is now governed in large part by federal statute, and in which, seven years after that statute's passage, lower courts are still deeply divided over the applicable legal standards. Definitive standards will allow churches and local governments to more easily predict the outcome of litigation and, for that reason, more readily fashion compromises acceptable to both sides.

In sum, religious communities (and particularly those outside the mainstream) regularly suffer from severe constraints on religious practice as a result of both deliberate and inadvertent burdens on their exercise of religion. Although both RLIUPA and the Constitution are designed to ameliorate such problems, lower courts have interpreted these provisions inconsistently, in some cases rendering important legal protections largely ineffective, while at the same time spawning unnecessary litigation over their application. Only this Court can provide consistent standards for evaluating under federal law the many land-use decisions that affect religious institutions and their members nationally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2007

APPENDIX A

UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 03 C 5761

VISION CHURCH,
Plaintiff-Appellant,

v.

VILLAGE OF LONG GROVE,
Defendant-Appellee.

October 17, 2005, Decided
October 18, 2005, Filed

AMENDED OPINION AND ORDER

CHARLES R. NORGLE, Sr., District Judge

Before the court is Defendant's Motion for Summary Judgment brought pursuant to *Federal Rule of Civil Procedure 56(c)*. For the following reasons, Defendant's Motion for Summary Judgment is granted.

I. BACKGROUND[1]

A. Facts

The voluminous record in this case arises out of a dispute between Plaintiff Vision Church ("Vision") and the Village of Long Grove (the "Village") over the development of real property. The Village of Long Grove is located on 18 square miles in Lake County, Illinois, and has a population of approximately 6,735. See http://www.longgrove.net (visited 9/30/2005).

Vision is an Illinois not-for-profit religious organization, with its principal place of business in Mundelein, Illinois. According to Vision, the church's congregation is composed of Americans of Korean decent. As of December 2000, Vision asserted that its then -- current congregation consisted of 140 adults and 80 youths and children. Vision estimated that by 2010, the congregation would grow to 1,000 adults and 500 children. Vision is a local church of United Methodist ("Methodist"), one of more than 30,000 other local churches.

Under Methodist ecclesiastical laws, the Northern Illinois Conference of the United Methodist Church (the "Conference") is the basic unit that connects Methodist to this geographical region. According to its website, Methodist has 34,892 local churches, comprised of 8,186,275 lay members, and 45,176 clergy members. See http://archives.umc.org. (visited 10/17/2005). Methodist's legislative branch is called the General Conference. General agencies within Methodist are primarily accountable to the General Conference. Each local church in the United States and Puerto Rico is part of a district, an

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[1] The court takes the undisputed facts from the parties' Local *Rule 56.1* Statements, and notes disputed facts within the text.

administrative and program grouping of 40-80 churches with a full-time superintendent. Districts are grouped into annual conferences, regional bodies that meet yearly for legislative purposes. Annual conferences approve the budget, elect delegates to General and Jurisdictional conferences, and examine and recommend candidates for ministry. Five geographic divisions in the United States include 8-13 annual conferences each. Jurisdictional conferences meet simultaneously every four years to elect and assign bishops and some members of general church agencies, and, in some cases, to develop jurisdictional programs. Each local church is governed by a charge conference with an administrative board as the year-round supervisor. A council on ministries coordinates the program of the congregation. In smaller churches, the board and the council are combined. See *id.*

1. Vision's 2001 Annexation Petition

In 1999, the Village Board of Trustees adopted and ratified a Comprehensive Plan which established certain fundamental goals and policies for land use within the Village limits. According to the Comprehensive Plan, essential to the Village's planning goals are the provisions for a quiet countryside, with an unhurried and unstructured environment where families can live in and enjoy open space. The Village has used the Comprehensive Plan as a guideline when it drafted its Zoning Code, and in make various zoning decisions, such as the approval of annexations and residential developments.

Also in 1999, Vision, which was then located in Park Ridge, began to look for a new site to build its church complex. Initially, Vision sought a 10 acre parcel of land. When it was unable to locate a tract suitable for its use, Vision entered into an agreement on July 29, 1999 to purchase a 27.4 acre vacant piece of land located in unincorporated Lake County. The contract contained a "zoning contingency clause," which enabled Vision to terminate the contract if it did not obtain zoning approval from

Lake County within 180 days (January 2000) of entering into the agreement. In October 1999, upon Vision's request, the sellers agreed to amend the zoning contingency, and extended the termination date until May 31, 2000.

In June 2000, Vision filed an application for voluntary annexation with the Village pursuant to *65 ILL. COMP. STAT. 5/7-1-8*. The application was conditioned on two results: that the Village (1) zone the property Residential, and (2) grant Vision a Special Use Permit. Vision's proposal included a 99,000 square-foot complex of five buildings, including a 1,000 seat sanctuary, and several smaller buildings.

Because Vision did not file its annexation petition by May 31, 2000, it did not exercise the termination clause under the contract. In September 2000, Vision eventually closed on the purchase of the property. As of that date, Vision had not applied to Lake County for approval to build a church complex on the property, and its voluntary annexation petition with the Village had not been granted. At the time of the closing, the 27.4 acre property was thus not located within the village limits, and as a result, the Village did not have the authority to zone the land or take action on any development plan under the Village's Zoning Code.

Consistent with the 1999 Comprehensive Plan, in June 2000, the land within the Village was divided into residential, business, office and research, and open space districts. Within these districts, the Zoning Code provided for Planned Unit Developments ("PUDs") as special uses. The majority of the Village is zoned either residential or approved PUD. Churches were classified as a "special use." In order to obtain approval as a "special use" an applicant must: (1) be in a zoning district where the use was allowed as a special use (i.e., churches in a residential district), and (2) meet the standards set forth in the Zoning Code. The specific standards in the Zoning Code did

not specify any minimum or maximum square foot requirement for a proposed building.

Special Use applications are initially brought before the Village Plan Commission. The Plan Commission is an advisory board that is responsible for conducting hearings and making recommendations in regard to certain land use decisions, including Special Use applications. After a public hearing, the Plan Commission makes a recommendation on the Special Use application to the Board. The Board has the final approval of a Special Use Application.

In March 2001, after lengthy negotiations, Vision presented the Village a revised proposal, seeking a 59,000 square-foot complex with three main buildings, including a 600 seat sanctuary, an administration building, and a Sunday school building. Then, on April 3, 2001, at a Plan Commission meeting, Vision orally agreed to various predevelopment conditions on their parcel. At the end of the April 3 meeting, the Village claims that the Plan Commission wanted more information on Vision's plan, and asked the church to submit a revised set of drawings that would: (1) reflect revisions consistent with the changes Vision agreed to, and (2) provide more detail regarding Vision's proposal. According to the Village, Vision never provided the Plan Commission with these materials. Vision, on the other hand, contends that the Plan Commission never requested a set of revised drawings.

On July 6, 2001, Vision's counsel informed the Village that Vision had chosen to rest on its application as presently submitted, and requested a vote on the pending application for annexation. Granting the request, a vote was scheduled on Vision's annexation petition for August 7, 2001. According to the Village, on August 6, Vision's counsel rejected several of the proposed conditions set forth by the Village, including the Village's request that Vision promise no future expansion if the Village approved a 59,000 square-foot facility. Such a restriction on growth is known as a conservancy easement. The next

day, the Plan Commission recommended the denial of Vision's application. Vision alleges that it agreed to limit future expansion, but did not want a conservancy easement because it wanted to reserve certain open space on the property as a play area for children. On August 14, the Board voted to accept the Plan Commission's recommendation, and formally declined to voluntarily annex the property.

2. The Valenti Property

In May 2001, Joseph Valenti ("Valenti"), a developer who owned land adjacent to Vision's parcel filed an application to have his 120-acre property annexed to the Village and approved as a residential PUD. On August 7, 2001, the same day as Vision's public hearing, the Plan Commission conducted a public hearing on Valenti's property. Then, at the September 4, 2001 meeting, the Plan Commission voted to recommend the voluntary annexation of the Valenti Property. On September 25, 2001, the Board voted 4-3 to approve the Valenti PUD, and on October 9, approved the annexation of the Valenti Property. As a result of this annexation, Vision's property became completely surrounded by land located within the Village boundaries. Under Illinois law, the Village could then involuntarily annex Vision's property without having to accept the conditions of rezoning and a special use permit that Vision had insisted upon when it sought voluntary annexation. See *65 ILL. COMP. STAT. 5/7-1-13.* Eventually, on October 23, 2001, the Village involuntarily annexed Vision's property. At the time the Village annexed the property, it was aware that Vision had applied to Lake County for approval of a plan. This County plan was bigger than Vision's March 2001 plan, which the Village rejected: the 59,000 square foot complex contained three main buildings and other smaller buildings.

According to the Village, the Valenti Property was annexed because Valenti's voluntary annexation petition and PUD proposal complied with the Village's zoning or-

dinance, land use goals and objectives set forth in the Comprehensive Plan. However, Vision claims that the Village rushed to annex the Valenti Property in order to involuntary annex Vision's land, and subject the church to the Village's zoning rules. Valenti's application was filed in May 2001, and approved by the Board in October, 2001. Vision does not claim any procedural improprieties.

3. The Public Assembly Ordinance and Denial of Vision's 2002 Application

In November 2001, Village Manager Cal Doughty ("Doughty") recommended to the Village Board that it consider a comprehensive amendment, the "Public Assembly Ordinance," to the Village Zoning Code for the location of, and standards for, "Public Assembly Uses," such as religious institutions, private schools, meeting halls, and clubs. On November 12, an initial draft of this Ordinance was presented to the Village President and Board. The Village contends that the Ordinance applies to all public assembly uses regardless of their religious or secular nature, and regardless of the speech conducted within these buildings. On April 9, 2002, the Board voted to enact the Ordinance.

As enacted, the Ordinance regulates the maximum number of square feet for public assembly buildings, and the maximum total volume of these buildings. See Am. Compl., Ex. F. The maximum square-footage and volume is dependant upon the size of the land on which the project is located, and the type of roadway it fronts. For example, public use buildings may only front state highways. *Id.* The Village asserts that this correlation between highway access and building size is based upon the planning principle that a state highway can accommodate more cars, people, and a larger complex. Vision, however, asserts that in the Village there is no rational distinction between State of Illinois and Lake County roads for purposes of servicing public facilities.

On January 23, 2002, two months after the Public Assembly Ordinance was proposed and under consideration by the Village, Vision applied for a special use permit to allow construction of a church complex on their property. In response to an inquiry made by the Village Manager regarding the new proposal, Vision's counsel stated that Vision was unwilling to restrict the use of certain open areas, and future construction on the site. On June 18, 2002, Vision presented a plan for an 80,000 square-foot proposal, but asked the Plan Commission to vote on the 99,000 square-foot plan. The Plan Commission recommended that the Board deny the application, and the Board accepted the recommendation and formally denied the special use application. Vision's 2002 application did not comply with the criteria set forth in the Public Assembly Ordinance, which required a complex like Vision's to have a maximum area of 55,000 square-feet. The Village claims that their denial of the special use application was not based on religion, but solely because Vision did not comply with the Public Assembly Ordinance. As of this date, Vision has not built a church complex on its property.

B. Procedural History

The Plaintiffs did not seek relief in the state court of the denial of its Special Use Application. In the federal court, Vision filed its original Complaint on August 18, 2003, and its Amended Complaint on January 14, 2005, alleging, *inter alia*, violations of the *Free Exercise* and *Establishment Clauses of the First Amendment*, the *Equal Protection Clause of the Fourteenth Amendment*, and violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

According to Methodist, Vision is one of Methodist's member congregations, and Bishop Sprague is the presiding official of the Conference and the episcopal authority whose responsibility it is to superintend the pastors and

ministries of all local churches. Methodist coordinates the work of all local churches within their geographic boundaries and is responsible for the ordination, character, fitness, and supervision of all clergy in the area. The real estate at issue in this case is held subject to a trust clause in favor of the Conference and the larger denomination and is also subject to reversionary rights in favor of the Conference. Therefore, even if a local church is discontinued or abandoned, the property will be held in trust for the benefit of the larger church.

Methodist describes the nature of their interests in this action as follows. Methodist ecclesiastical laws and tenets are set forth in the Methodist Constitution and the Book of Discipline. Pursuant to the Book of Discipline, the annual Conference is constructed as a beneficial trust. The Conference, through its Board of Trustees, is also instrumental in safeguarding trust property, if necessary, by appropriate legal action. The Conference provides certain financial assistance to its local churches, but also, is financially dependent on such churches to fund its administrative budget and ministries. The local church's support is derived from remittances called "apportionments" from each local church to the Conference Treasurer to fund religious outreach activities and staffing costs. Therefore Methodist moved to intervene to address the issues and protect its interest as they may appear. See *Vision Church v. Long Grove, No. 03-5761, 2004 U.S. Dist. LEXIS 5724 (N.D. Ill. April 6, 2004)* (granting the Motion). Vision, however, alleges no discrimination against Methodist by the Village.

On February 8, 2005, the court denied Vision's Motion to Compel the depositions of various Village managers. See *Vision Church v. Vil. of Long Grove, 226 F.R.D 323 (N.D. Ill. 2005)*. Then, on March 9, the Village and Vision filed cross Motions for Summary Judgment. Vision seeks Summary Judgment on Counts 1, 2, 4, 5, 6, 8, 10, and 11, and the Village seeks summary judgment on the entire

Complaint. Both parties filed their Responses on June 8, 2005, and Replies on July 15, 2005. The Village's Motion for Summary Judgment is fully briefed and before the court.

II. DISCUSSION

A. Standard of Review

Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c).* The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, see *Heft v. Moore, 351 F.3d 278, 283 (7th Cir. 2003),* that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. See *Szymanski v. Rite-Way Lawn Maintenance Co., 231 F.3d 360, 364 (7th Cir. 2000);* see also *Vukadinovich v. Bd. of Sch. Tr.'s of North Newton School, 278 F.3d 693, 699 (7th Cir. 2002).*

In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. See *Stinnett v. Iron Works Gym/Executive Health Spa, Inc., 301 F.3d 610, 613 (7th Cir. 2002).* The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See *FED. R. CIV. P. 56(c);* see also *Koszola v. Bd. of Educ. of City of Chicago, 385 F.3d 1104, 1108 (7th Cir. 2004).* "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." See *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962);* see also *First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 280, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); Spiegla v. Hull, 371 F.3d 928, 935 (7th Cir. 2004).* The choice between reasonable inferences from facts is a jury function. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

When a party moves for summary judgment, the court must view the record and all inferences in a light most favorable to the non-moving party. *Ameritech Benefit Plan Comm. v. Communication Workers of Am., 220 F.3d 814, 821 (7th Cir. 2000).* However, the inferences construed in the non-moving party's favor must be drawn from specific facts identified in the record that support that party's position. See *Szymanski, 231 F.3d at 364.* Under this standard, "conclusory allegations alone cannot defeat a motion for summary judgment." *Thomas v. Christ Hospital and Medical Center, 328 F.3d. 890, 892-93 (7th Cir. 2003)* (citing *Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).*

B. Vision's *First Amendment* Claims[2]

1. Vision's Establishment Clause Claim

The first clause of the *First Amendment to the Constitution* provides that "Congress shall make no law respecting an establishment of religion." *CONST. AMEND. 1.* This is commonly known as the *Establishment Clause.* The *Establishment Clause* requires the government to remain neutral with respect to religion, religious beliefs, and practice. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central *Establishment Clause* value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County, Kentucky v. Amer. Civil Liberties Union of Kentucky, 125 S. Ct. 2722, 2733, 162 L. Ed. 2d 729 (2005).* The *Establishment Clause* "prohibits government from

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[2] Count VII is styled "*First Amendment*: Exclusion." There is no "exclusion" clause in the *First Amendment*, and therefore the court grants summary judgment on this Count.

appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 594, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989)* (quoting *Lynch v. Donnelly, 465 U.S. 668, 687, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)).* The Supreme Court has stated that the *Establishment Clause* means "that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." *Id. at 590-91.*

When a court considers "whether a state action violates the *Establishment Clause* it must consider: (1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion." *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 704 (7th Cir. 2005)* (quoting *Books v. City of Elkhart, 235 F.3d 292, 301 (7th Cir. 2000)).* Furthermore, "the Supreme Court has emphasized the case-by-case nature of a court's review of an alleged *Establishment Clause* violation." *Id. at 702* (citing *Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 315, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000)*; see *Van Orden v. Perry, 125 S. Ct. 2854, 2860, 162 L. Ed. 2d 607 (2005)* (pointing out that the Court has selectively applied the Lemon test to *Establishment Clause* claims over the past 25 years)). At it's very core, the *Establishment Clause* requires that government remain neutral towards religion. *Id.* (citing *Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 2121, 161 L. Ed. 2d 1020 (2005)).* With these principles in mind, we turn to Vision's *Establishment Clause* claim.

First, there is no genuine issue of material fact as to whether the Village's Public Assembly Ordinance has a secular purpose. See *Lemon, 403 U.S. at 612.* The Ordinance is secular in purpose because it merely controls development, and not Vision's religious activities. While the Village's stated purpose for the Ordinance is to enforce zoning regulations, Vision does not offer evidence to rebut the Village's claim that its intent to enact the statute was driven by religious animus. The mere temporal proximity between Vision's involuntary annexation and the passage of the Public Assembly Ordinance does not create a genuine issue of material fact as to the Village's intent for enacting the law. "Although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County, 125 S. Ct. at 2735.* There is no evidence in the record to suggest that the Village, through the enactment of the Public Assembly Ordinance, has endorsed a specific religion, that the Village's stated reasons are disingenuous, or give the impression that one religion is favored or preferred. See *County of Allegheny, 492 U.S. at 593.*

Second, the primary effect of the Ordinance is to regulate where and how certain public use facilities may be constructed in the Village. It neither advances one religion, nor inhibits Vision's members from practicing theirs. There are no religious overtones to the Ordinance. Third, there is no genuine issue of material fact as to whether there is excessive entanglement between the government and religion as a result of this Ordinance. The Village is not involved in every step of the building process, nor are there any regulations on religious activity. According to the Village, the goal of the Ordinance was to "advance its zoning and land use goals, not to inhibit the practice of religion in the Village." Def.'s Mot. for Summ. J., at 21.

There is no evidence in the record to suggest that the Village has affiliated itself with one religion, and thereby

taking sides against Vision. See *County of Allegheny, 492 U.S. at 593.* In fact, the Public Assembly Ordinance is generally applicable to all religious and nonreligious entities. The Ordinance effects all groups, regardless of religious or political affiliation. See *Lemon, 403 U.S. at 612.* The Public Assembly Ordinance has a secular purpose, it neither advance or inhibits one religion at the expense of another, nor does the Ordinance create excessive entanglement between the Village and Vision. As a result, there is no genuine issue of material fact as to whether the Village, through the passage of the Public Assembly Ordinance, has violated the *Establishment Clause*, and summary judgment is therefore appropriate for the Village as to Vision's *Establishment Clause* claim. See *Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765-766 (7th Cir. 2003)* (generally applicable zoning ordinance did not violate *First Amendment*, where regulation was motivated by legitimate considerations involving land use and placed churches on equal footing with nonreligious assembly uses).

2. Vision's Free Exercise Claim

The second clause of the *First Amendment* provides that "Congress shall make no law . . . which prohibits the free exercise of religion." *CONST. AMEND. 1.* "The protections of the *Free Exercise Clause* pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).* Government action "that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* "The *Free Exercise Clause* protects against governmental hostility which is masked, as well as overt." *Id.*; see *McCreary County, 125 S. Ct. at 2735; U.S. v. Indianapolis Baptist Temple, 224 F.3d 627, 629 (7th Cir. 2000).* "The *Free Exercise Clause* . . . does not afford an

individual the right to dictate the conduct of the Government's internal procedures." *Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 125 S. Ct. 2055, 2064, 161 L. Ed. 2d 896 (2005)* (quoting *Bowen v. Roy, 476 U.S. 693, 700, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986)).*

"The touchstone for our analysis is the principle that the *First Amendment* mandates governmental neutrality between religion and religion, and religion and nonreligion." *Id.* (quoting *Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968)).* The Seventh Circuit instructs us that "in the context of the *Free Exercise Clause,* [plaintiff] must first establish that his right to practice [religion] was burdened in a significant way." *Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005).* With these principles in mind, we turn to Vision's Free Exercise Claim.

Under a Free Exercise analysis, Vision's right to practice religion has not been significantly burdened. See *Kaufman, 419 F.3d at 683.* While a governmental body is afforded great deference in their zoning regulations, they cannot cloak themselves in the shroud of legitimacy to discriminate on the basis of religion, and avoid constitutional scrutiny. The Village must be mindful that the "*First Amendment* mandates governmental neutrality between religion and religion, and religion and nonreligion." *Kaufman, 419 F.3d at 683.* Here, the only prohibition imposed on Vision is a restriction on the physical size of the proposed buildings. There is no restriction on Vision's beliefs or customs. The Village is not required to abandon its zoning regulations and growth concerns to satisfy a single religious entity's desire for unmitigated development, any more than Vision can "dictate a Government's internal procedures." *Johanns, 125 S. Ct. at 2064.*

It is reasonable to say that a church with a congregation of 140 adults and 80 children is not "significantly burdened" in this case for purposes of the *First Amend-*

ment. See *Kaufman, 419 F.3d at 683.* A church that is 55,000 square feet has ample space to house a congregation of 140 adults and 80 children comfortably. This is not a situation where the Village has restricted Vision to a one room building where all the members must stand shoulder to shoulder in order to pray. The maximum square footage allowed by the Village does not constitute a significant burden on religion for *First Amendment* purposes.

Additionally, the court notes that the Village has remained neutral as to all religious groups within its borders. The Public Assembly Ordinance does not distinguish between religions, it merely classifies between neighborhood, community, and regional facilities. See Am. Compl., Ex. F. "The minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, 508 U.S. at 533.* Here, the Village has satisfied this requirement, and not run afoul of the *First Amendment.* There are no words with religious meanings, such as "sacrifice," and "ritual" that would make the Ordinance fail the test of neutrality. See *id.* As noted previously, the Village has in no way prohibited Vision from practicing its religion. It has only restricted the size and structure of its physical house of worship. Such a restriction is fully within the right of a municipality. See *Civil Liberties for Urban Believers, 342 F.3d at 761.* Generally speaking, "a zoning ordinance imposing restrictions in respect of the use and occupation of private lands in urban communities' such as the segregation of residential, business, and industrial buildings' satisfies the rational basis tests as a valid exercise of authority.'" *Id. at 766.* Therefore, Vision has not introduced any evidence as to the Village's intent, or that it has not remained neutral as to Vision's religious beliefs. As a result, summary judgment is appropriate for the Village as to Vision's Free Exercise claim. See *id.*

C. Vision's RLUIPA Claims

1. Vision has not suffered a "substantial burden" for purposes of the RLUIPA

The RLUIPA states, in part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution --
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). The Act "defines religious exercise' to include any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Cutter, 125 S. Ct. at 2118* (citing *§ 2000cc-5(7)(A)*). The RLUIPA "was passed after the Supreme Court's decision in *City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997),* which invalidated the Religious Freedom Restoration Act ("RFRA") of 1993." *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005).* "The drafters of the RLUIPA sought to avoid RFRA's fate by limiting the scope of the new Act to (1) state regulations (statutory or administrative) that affect commerce, (2) programs that receive federal financial assistance, and (3)

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programs under which the agency makes individualized assessments of the proposed uses for the property involved.'" *Id.* Furthermore, "the RLUIPA is not unconstitutional on its face, in all possible applications." *Id.* (citing *Charles v. Verhagen, 348 F.3d 601, 610-11 (7th Cir. 2003)).* The RLUIPA "forbids government to impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non religious assembly or institution.'" Id (quoting *42 U.S.C. § 2000cc(b)(1)*). "The substantial burden provision . . . must mean something different from great burden than imposed on secular institutions." *Id.* Finally, if a "land-use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." *Id.*

The Village admits that the RLUIPA is applicable to the denial of Vision's 2002 Special Use application. However, Vision did not incur a "substantial burden" for purposes of the RLUIPA. Under the Village's Public Assembly Ordinance, Vision would have been able to build a 55,000 square-foot facility on the property. Ultimately, it was Vision, not the Village that made the final determination not to build the church and surrounding buildings. Vision refused to comply with the Village's zoning standards, and failed to submit an application that complied with the Public Assembly Ordinance. The RLUIPA does not guarantee that a religious organization may build a complex as large as that organization desires. A municipality can control growth and expansion within its city limits. Limiting Vision's development did not "substantially burden" the church in the practice of its religion. It simply placed limitations on the size of a church that could be built on the 27.4 acre parcel.

Vision alleges that it was "substantially burdened" within the meaning of the RLUIPA when the Village ex-

ercised its discretion to impose over fifty conditions on Vision. Specifically, Vision claims it has paid over half a million dollars in fees and expenses during the Special Use application process. Vision argues the actions undertaken by the Village were done to frustrate the proposed development of the church complex.

However, Vision has not shown how a congregation of 140 adults and 80 children are substantially burdened by having a 55,000 square-foot facility, instead of the requested 99,000 square foot complex. "Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word substantial,' because the slightest obstacle to religious exercise incidental to the regulation of land use -- however minor the burden it were to impose -- could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means." *Civil Liberties for Urban Believers, 342 F.3d at 761.* The Village's Public Assembly Ordinance is only an obstacle for Vision in terms of the physical size of the church, not an obstacle to their religious exercise.

For purposes of the RLUIPA, "a land use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property . . . impracticable." *Id.* Vision has not established a genuine issue of material fact as to how the church is substantially burdened because it cannot build a 99,000 square-foot facility, or that the Village's ordinance rendered any religious exercise on the property effectively impracticable. If Vision had complied with the 55,0000 square-foot requirement, there might be a church complex today. That Vision paid substantial fees and expenses, or was subjected to the same ordinance as other developers who wish to build in the

Village, does not create a substantial burden for Vision. Presumably, other landowners who go before the Plan Commission spend money on attorneys' fees and other costs related to their petition. While Vision is not required to prove their case at the summary judgment stage, it must submit some evidence that creates a genuine issue of material fact, and because this was not done, summary judgment is appropriate for the Village as to Vision's claim under *§ (a)(1)* of the RLUIPA. See *E.E.O.C. v. Sears, Roebuck & Co., 417 F.3d 789, 792 (7th Cir. 2005).*

2. Vision has been treated on equal terms with non-religious entities

Section 2(b)(1) of the RLUIPA provides, in part, "No government shall impose or implement a land use regulation in a manner that treats a religious assembly use or institution on less than equal terms with a nonreligious assembly or institution." *42 U.S.C. § 2000cc(2)(b)(1).* Moreover, *§ 2(b)(3)(A)* states that no government shall impose a land regulation that "totally excludes religious assemblies from a jurisdiction." *42 U.S.C. § 2000cc2(b)(3)(A).* Vision, however, has not identified a non-religious group that has received more favorable treatment. In fact, the Village is currently in litigation with another petitioner, a private school, who failed to comply with the Public Assembly Ordinance.[3] Additionally, the Public Assembly Ordinance did effect existing churches within the Village, as a result of the 11,000 square feet maximum space requirement for neighborhood public assembly uses. After the passage of the Ordinance, several of the existing churches in the Village were non-conforming. See Def.'s Resp. to Pl.'s Amend.

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[3] That case, Montessori Peace School, et al v. Village of Long Grove, is currently in the circuit court of Lake County. Case No. 04 CH 525.

Stmt. of Mat. Facts, P 60; Def.'s Stmt. of Mat. Facts, P 82. Therefore, for purposes of the RLUIPA, the Village has demonstrated that it does not apply the Ordinance only to religious institutions, but evenly to all petitioners that come before the Plan Commission.

Furthermore, the public school that Vision claims was excluded from the Ordinance was built in 1999, before the Public Assembly Ordinance was enacted. "The Government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Jacobsen v. Ill. Dep't of Transportation, 419 F.3d 642, 647 (7th Cir. 2005).* As a result, Vision cannot show a genuine issue material fact as to a violation of *§ 2000cc2(b)(3)(A),* and summary judgment is proper for the Village on Vision's RLUIPA Equal Protection Claims.

D. *Fourteenth Amendment*: Equal Protection Claim

Vision also claims that the Village violated the *Equal Protection Clause of the Fourteenth Amendment* when it passed the Public Assembly Ordinance. It is the established law in the Seventh Circuit that "absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." See *Civil Liberties for Urban Believers, 342 F.3d at 766.* Furthermore, "unless a statute classifies by race, alienage, or national rights, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'" *Id.* (quoting *City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)).*

The first step in any *Equal Protection Clause* analysis is to identify whether the government has classified different groups, i.e, drawn a distinction among people. See

Personnel Adminstrator of Mass. v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). Second, once the classification has been identified, the next step is to identify the level of scrutiny applied to the law. See *Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 712 (7th Cir. 2002).* "Typically, an equal protection claim focuses on the denial of a fundamental right or disparate treatment of persons depending on the claimant's suspect classification." *Id.* These claims are examined under a more exacting strict scrutiny test, while other equal protection claims are examined under the deferential rational basis test. *Id.*

The Public Assembly Ordinance does not classify on the basis of race, gender, or national origin. Nor does it classify on the basis of religion. The only distinction made in the Ordinance is between public assembly and private locations. See Am. Compl., Ex. F. Governments have wide discretion in the enactment of legislation that furthers economic growth of the community. "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose." *Hodel v. Indiana, 452 U.S. 314, 331-32, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).*

Although Long Grove's Ordinances are facially valid, laws valid on their face may still violate the Constitution in their application. In the seminal case of Yick Wo v. Hopkins, Justice Matthews wrote,

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circum-

> stances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

Vision asserts that the manner in which Long Grove has applied its Ordinances to Vision has resulted in Vision being treated differently from other similarly situated entities in Long Grove, and that Long Grove has no rational basis to explain this different treatment. Amended Compl., PP 28-32. Put another way, Vision's assertion is that it is a "class of one" whose Equal Protection rights under the United States Constitution have been violated. "The Supreme Court . . . declared that class of one equal protection claims are valid where the plaintiff alleges that she has been intentionally treated differently than others similarly situated and that there is no rational basis for the difference in treatment.'" *Olech v. Village of Willowbrook, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)).*

To establish a prima facie case of "class of one" discrimination, Vision must "present evidence that [Long Grove] deliberately sought to deprive [Vision] of the equal protection of the laws for reasons of a personal nature unrelated to the duties of [Long Grove's] position." *Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000).* Specifically, Vision must show that they were: "(1) intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," or (2) "that the government is treating unequally those individuals who are prima facie identical in all relevant respects, and that the cause of the differential treatment is a totally illegitimate animus toward the plaintiff by the defendant." *Nevel v. Vill. of Schaumburg, 297 F.3d 673, 681 (7th Cir. 2002).*

First, Vision has submitted no evidence that could suggest that the Village treated it differently from other

similarly situation institutions. In fact, Vision cannot show that others similarly situated as Vision have received preferential treatment. Vision merely claims that bar, restaurants, and taverns are not subjected to the Public Assembly Ordinance. See Am. Compl., P 41. However, these uses were only allowed in the Village's business district, as opposed to the Residential district where Vision wishes to build. Second, there is no evidence that demonstrates that the government is treating other individuals who are virtually identical to Vision in a more lenient matter. See *id.* The evidence Vision has submitted is that it was denied a zoning permit to build a 56,000 square foot facility. There is nothing to indicate that the Village intentionally treated Vision different from others, or that the Village's actions are wholly unrelated to a legitimate governmental objective. See *Civil Liberties for Urban Believers, 342 F.3d at 766*; see also *Olech, 528 U.S. at 564.* Vision was treated the same under the Ordinance as any other developer who would appear before the Plan Commission.

The Public Assembly Ordinance at issue in this case is equally applicable to all public assembly places, and does not discriminate against one group, as opposed to another. The Ordinance is rationally related to the stated government objectives. Specifically, the Village's stated planning goals are for a quiet countryside, with an unhurried environment where families can enjoy the open space. The Public Assembly Ordinance furthers that goal by limiting the size of certain buildings operated for public use, and through the designation of which facilities may be located on specific county or state highways. See Am. Compl., Ex. F. When an ordinance is facially neutral and generally applicable, as the Public Assembly Ordinance is here, the rational basis test is applied. See *Civil Liberties for Urban Believers, 342 F.3d at 766.* Strict scrutiny is reserved for statutes which deny a fundamental right or make distinctions among suspect classes, such as religion, race, or national origin. See *Richmond v. J.A.*

Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); see also *Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).*

Vision has failed to establish a genuine issue of material fact as to whether they are being treated differently from others similarly situated. In its Amended Complaint, Vision claims that six churches in the Village have similar, or higher seating capacity per acre than Vision's proposed maximum density of 36 persons per acre. For example, out of the six diverse religious institutions within the Village, four of them have a higher density. Life on the Vine Christian Church had a density of 39.1 persons per acre, Congregation Beth Judea had 87.9 persons per acre, Temple Chai had 105.1 persons per acre, and Long Grove Community Church had a density of 260 persons per acre. The purpose of the Public Assembly Ordinance was to "regulate the size of all new public assembly uses, including churches . . . and served the rational purpose of ensuring that new assembly uses were consistent with the Village's zoning goals." However, all of these structures were built prior to the Public Assembly Ordinance, and those building erected after the Ordinance was passed are subject to the Ordinance's regulations. See supra, note 3.

Additionally, two busy public schools are located across the street from Vision's land, on 75 acres, with a combined student and staff capacity of 1300 people. See Pl.'s Stmt. of Mat. Facts, P 92-93, 96. The schools are combined onto one, 4.1 acre building, 172,000 square feet, with at 191,000 square foot parking lot. See Pl.'s Resp. at 19. However, both of these schools were built prior to the enactment of the Public Assembly Ordinance. Additionally, public schools serve a completely different function separate from churches, and the Village did not have zoning authority over the location and size of these schools. See Def.'s Stmt. of Mat. Facts, P 82. One of the schools has filed a lawsuit in Lake County Circuit Court.

At its core, Vision's argument is that the denial to build a larger religious structure, somehow amounts to a violation of Vision's equal protection rights under the *Fourteenth Amendment*. However, "whatever the obstacles that the [Village] might present to a church's ability to locate on a specific plot of land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs." *Civil Liberties for Urban Believers, 342 F.3d at 766.* This is the most significant aspect of this case. The Village in no way prohibited Vision's members from practicing their religion. The limitations the Village placed on Vision's location "are not the regulation of a belief, any more than regulating the location of the Chicago Tribune building is a regulation of the newspaper's *First Amendment*-protected product." *Id.* (quoting *Civil Liberties for Urban Believers v. City of Chicago, 157 F. Supp.2d, 903, 908 (N.D. Ill. 2002).* Here the Village allows any and all religious groups to build within its boundaries, provided that the religious groups adhere to the Village's zoning requirements. In the final analysis, the Village does not try to place restrictions on Vision's beliefs or their ability to practice its religion. Such a concern does not run afoul of the Constitution. Therefore, because Vision cannot establish a genuine issue of material fact as to whether the Village denied Vision its *Fourteenth Amendment* Equal Protection rights, summary judgment is proper for the Village as to Vision's Equal Protection claim.

E. Vision's Vested Rights Claim

Vision's Amended Complaint also contains a vested rights claim. Vision alleges that it acquired a vested right to build a church on the property after it sold its facility in Park Ridge in reliance on the Lake County Zoning Ordinance. See Am. Compl., PP 57-58. Under Illinois law, in order for a plaintiff to have vested rights to a zoning approval, that plaintiff must spend money in reliance on the probability that zoning approval will be forthcoming un-

der the municipality's existing laws. See *Northern Trust Co. v. County of Lake, 353 Ill. App. 3d 268, 818 N.E.2d 389, 397, 288 Ill. Dec. 701 (Ill. App. Ct. 2004).* A landowner's need for approval on the part of the municipality, such as the grant of a special use permit, defeats a vested rights claim. See id; see also *Zeitz v. Vil. of Glenview, 304 Ill. App. 3d 586, 710 N.E.2d 849, 855-56, 238 Ill. Dec. 52 (Ill. App. Ct. 1999).*

When a property owner spends money or incurs obligations in "reliance on the probability that a building permit will be issued . . a vested right to obtain the permit may be acquired . . . even though the zoning classification of the property is subsequently changed to prohibit the proposed use." *Northern Trust, 818 N.E. 2d at 397.* In order for a landowner to invoke this rule, he must show: "(1) that there was a probability' that [municipal approval] would issue, and (2) that a substantial change in position was incurred based upon this probability." *Id.* (citing *Bank of Waukegan v. Vil. of Vernon Hills, 254 Ill. App.3d 24, 31, 626 N.E.2d 245, 193 Ill. Dec. 212 (1993)).* Probability of municipal approval is established when the "property at issue is zoned to permit the use requested by the landowner." *Id.*

Vision challenges the county ordinance, alleging, "under the Lake County Zoning Code, a church was a permitted use, as of right, on the property." Am. Compl., P 55. Therefore, it appears that Vision's Vested Rights cause of action is grounded in the Lake County Zoning Ordinance. "Vision was legally entitled to rely on the Lake County zoning of the Subject Property in their decision to purchase it. . . . Accordingly, Vision acquired a vested right to build a church on the Subject Property." *Id.*, PP 56-57. However, Vision names only the Village in its suit.

Furthermore, Vision cannot establish that there was a probability of municipal approval to build a church complex on its property. When Vision bought the land, the contract included a contingency clause that allowed Vi-

sion to terminate the contract if it did not receive approval from the Village. See Def.'s Stmt. of Mat. Facts, P 19, Ex. 7. Vision decided not to terminate the contract. Therefore, Vision cannot establish that there was a probability that the Village would have granted its application, when Vision itself is uncertain as to how the Village would decide the issue. As a result, there are no genuine issues of material facts as to Vision's Vested Rights claim and summary judgment is appropriate as to this count. See *Szymanski, 231 F.3d at 364.*

F. Arbitrary and Capricious Denial of Special Use Permit

Vision also alleges that the Village's denial of the Special Use permit was arbitrary and capricious. Vision further alleges that the reasons given by the Village, such as the proposed use was not compatible with the surrounding neighborhood, and that Vision had a hidden agenda to create a super-church, were not a proper basis for the denial of a special use permit. See Compl., P 52. Vision also seeks damages in excess of $ 10,000,000.00 for economic losses caused by the Village's actions.

Under the Illinois Tort Immunity Act, municipalities are immune from damages resulting from their legislative decisions. See *745 Ill. Comp. Stat. 10/2-104*; see also *Vil. of Bloomingdale v. CDG Enterprises, Inc., 196 Ill. 2d 484, 752 N.E. 2d 1090, 1099-1100, 256 Ill. Dec. 848 (Ill. 2001)* ("*section 2-104* plainly grants immunity for injury caused by the denial of any permit' and is, therefore, controlling."). Therefore, Vision is barred from recovering damages against the Village for their official actions. There is no evidence that raises more than a mere scintilla of evidence to show a genuine triable issue of material fact on this matter. See *Szymanski, 231 F.3d at 364*; see also *Vukadinovich, 278 F.3d at 699.* As a result, summary judgment is appropriate as to Vision's Arbitrary and Capricious claim.

III. CONCLUSION

As the Seventh Circuit reminds us, "federal courts are not boards of zoning appeals." *River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994).* While Vision may have received an unfavorable decision from the Village, this court will not review the Board's ruling absent clear evidence of constitutional violations. For the foregoing reasons, the court grants Defendant's Motion for Summary Judgment as to all counts.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR. Judge

United States District Court

DATED: October 17, 2005

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 05-4144 & 05-4234

VISION CHURCH,
Plaintiff-Appellant,

v.

VILLAGE OF LONG GROVE,
Defendant-Appellee.

May 2, 2006, Argued
November 7, 2006, Decided

RIPPLE, *Circuit Judge*. In 2003, Vision Church, United Methodist ("Vision") filed the present action against the Village of Long Grove, Illinois ("Village"); Vision alleged that the Village's denial of Vision's application for voluntary annexation, its involuntary annexation of Vision's property, its enactment of a municipal Public Assembly Ordinance, and its denial of Vision's applications for a special use permit to build and occupy a church on real property it had purchased violated the *First* and *Fourteenth Amendments to the Constitution of the United States*, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), *see 42 U.S.C. § 2000cc*, and various Illinois laws. The district court granted summary judgment in favor of the Village on October 7, 2005. Vi-

sion now appeals. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I. BACKGROUND

A. Facts

1. Application for Annexation

Vision is a religious corporation of the State of Illinois currently located in Mundelein, Illinois; it was founded in 1981, joined the United Methodist denomination in 1988, and adopted the name "Vision Church, United Methodist" in August 2001. Its membership, which currently totals approximately 120 persons, consists primarily of Korean-Americans.

The Village of Long Grove is an 18-square mile community located in Lake County, Illinois, with a population of approximately 6,000. According to the Village's "Comprehensive Plan," it is dedicated to preserving its "rural character," to the "provision of a quiet countryside" and to the enjoyment of "open space." R.98, Ex.3 at 02-1, 03-1. The Zoning Regulations of the Village of Long Grove ("Zoning Regulations") govern the building and location of public buildings, including religious institutions; under the Zoning Regulations, religious institutions are permitted as "special uses" in areas zoned as "R1," "R2" and "R3" Residential Districts, as are schools, fire stations and sewage treatment facilities.[1] *See* Zoning Regulations:

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[1] The Village's Zoning Regulations divide land into the following zoning districts: Residential ("R1," "R2" and "R3"); Historic Business ("B1"); Suburban Business ("B2"); Office and Research ("O&R"); Office ("O"); and Open Space ("OS-N," "OS-P" and "OS-R"). *See* Zoning Regulations: The Village of Long Grove § 5-3-1, R.99, Ex.2 (hereinafter "Zoning Regulations"). Each of the zones provide for "special uses." *Id.* § 5-2-11. To obtain a special use permit, an applicant must be in a district where the use is permitted as a "special use" and must meet the standards for qualifying as a special use set forth in § 5-11-6(D) of the Zoning Regulations. *See id.* § 5-11-6(D).

The Village of Long Grove § 5-4-2-2, R.99, Ex.2 (hereinafter "Zoning Regulations") (setting forth the special uses allowed in a "R1" district); *id.* § 5-4-3-2 (same for "R2"); *id.* § 5-4-4-2 (same for "R3"); *see also id.* § 5-11-6(D) (setting forth the procedures governing the Village's consideration of an application for the "special use" of a property).

Prior to 1999, Vision was located in Park Ridge, Illinois. In 1999, however, it began looking for a new church site: It expected its membership to grow significantly in the upcoming years and desired a larger facility. It purchased a 27.40-acre vacant plot in unincorporated Lake County, Illinois, in September 2000, "with [the] intention to build a church there." R.1-1 at 3. "[M]any Korean-American immigrants in the Chicago-area and families in the congregation had moved to Lake County," making the site ideal for the construction of a new church facility. R.177-2, Ex.76 at 2.

At the time of purchase, Vision's property was zoned for church development under the Lake County Zoning Code; however, Vision desired to build the church within the incorporated municipality of the Village of Long Grove. Reverend Soon-Chang Jang, the head pastor of Vision Church, has explained that "Vision wanted to build a good relationship with the Long Grove residents," and believed that being within the Village would further this goal. *Id.* at 5. Therefore, on June 6, 2000, Vision applied to the Village of Long Grove for annexation under *65 ILCS 5/7-1-8*. *See 65 ILCS 5/7-1-8* ("Any territory which is not within the corporate limits of any municipality but which is contiguous to a municipality at the time of annexation. .. may be annexed to the municipality. .. [by] a written petition signed by the owners of record. .. . A majority vote of the corporate authorities then holding office is required to annex."). In its application, Vision requested as a condition of annexation that the Village zone its property "Residential (R2)" and grant Vision a "special

use" permit to construct a church complex on the property. R.177-1, Ex.52 at 1. It proposed plans for a 99,000-square foot church facility, consisting of five main buildings and an over 1,000-seat sanctuary.

Soon after the submission of this application, Vision and the Village entered negotiations over the conditions of annexation. During these negotiations, the Village expressed concern about the size of the church complex and its compatibility with the Village's goal of protecting natural resources and maximizing open space. In December 2000, at the Village's request, Vision agreed to submit revised plans; in March 2001, its representatives presented these revisions to the Plan Commission of the Village of Long Grove ("Plan Commission"). Under the new plans, the size of the church complex had been decreased to 56,200 square feet, consisting of three main buildings (a sanctuary, an administration building and a Sunday school building); the sanctuary would seat 600 instead of 1,000; and parking spaces were reduced from 400 to 240.

In addition, Vision agreed to comply with some, but not all, of the Village's conditions on construction. For example, it agreed to remove the "Fountain, Chapel in the Woods and Outdoor Amphitheater" from the plan, to mark "[a]ll wetland and conservancy soils. .. as lowland conservancy easements," and to serve the religious facilities "by on-site waste disposal systems and/or septic systems." R.98, Ex.14 at 2 (describing the conditions); *see also id.*, Ex.15 at 1 (accepting the conditions). However, in a letter dated August 6, 2001, Vision refused to consent to the following limitations: (1) that "easement language. .. be placed on site plan indicating no future structures or impervious parking allowed"; (2) that "[t]he area marked 'playing field' on the east side of the plan. .. be marked 'Natural Landscaped Area'. .. and no organized outside activities. .. be allowed in the area"; and (3) that "[o]nly two services Sunday or holidays excepting weddings and funerals [be held]. And no more than one major activity

each week Monday through Friday, excepting weddings and funerals." *Id.*, Ex.14 at 2; *see also id.*, Ex.15 at 1 (rejecting the conditions). Specifically, Vision claimed that the second condition was inconsistent with its intention "to have a playground for children"; it claimed that the third limitation "necessarily entangle[d] the Village in the operations of the Church." *Id.*, Ex.15 at 1.

On August 7, 2001, the Plan Commission voted to recommend the denial of Vision's application for annexation.[2] On August 14, this recommendation was accepted by the Long Grove Board of Trustees ("Board").[3]

2. Involuntary Annexation and the Public Assembly Ordinance

In May 2001, while Vision's application for annexation still was pending with the Plan Commission, a local developer, Joseph Valenti, also applied for voluntary annexation of his land. Valenti owns 120 acres of land adjacent to Vision's property; like Vision, Valenti wanted his land to be within the Village's corporate boundaries. He further requested that, upon annexation, the Village rezone his land "Residential." The Plan Commission recommended approval of Valenti's application on Septem-

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[2] *See also* Plan Commission Agenda, R.100, Ex.21 at 2 (summarizing the Plan Commission's objections to the revised plans, including "the size of the parking lot; the buildings having been reduced by only a few thousand square feet; the future growth. ..; and the setting of precedent for future development on large parcels within the Village").

[3] No action was taken at this time with regard to Vision's application to rezone its land as a Residential District or for a special use permit. In the absence of annexation, the Village did not possess jurisdiction over Vision's property and, therefore, had no authority to address these matters.

ber 4, 2001.[4] The Board accepted this recommendation on October 9, 2001.

As a result of the annexation of Valenti's property, Vision's land was surrounded on all sides by property within the Village's corporate boundaries. Under *65 ILCS 5/7-1-13*, the Village therefore had the authority to involuntarily annex Vision's property without regard to the conditions of annexation previously set by Vision. *See 65 ILCS 5/7-1-13* ("Whenever any unincorporated territory containing 60 acres or less, is wholly bounded by [] one or more municipalities. .. that territory may be annexed by any municipality by which it is bounded in whole or in part, by the passage of an ordinance to that effect after notice is given as provided in this Section."). On October 23, 2001, the Village passed an ordinance annexing Vision's property. *See* An Ordinance Annexing the Surrounded Property at the Southwest Corner of Gilmer and North Krueger Roads, R.1-1, Ex.D at 1-2 (noting that because "the unincorporated territory [owned by Vision] is contiguous to and totally surrounded by the Village of Long Grove," with proper notice, it may be annexed under *65 ILCS 5/7-1-13*). The Village zoned the property "R2" Residential, the zoning classification sought by Vision in its June 2000 application for annexation.[5]

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[4] Vision alleges that the Village "accelerated public hearings and development approvals" for Valenti's annexation application, in order to facilitate the subsequent involuntary annexation of Vision's property. *See* R.1-1 at 5 (noting that, typically, approval of an application for annexation takes far longer than 90 days).

[5] The involuntary annexation of Vision's property terminated its application for approval of building plans with Lake County. When purchased by Vision, the property in question was located in Lake County. Vision thereafter applied for voluntary annexation to the Village; as an alternative to annexation, it also applied at this time for permission from Lake

In November 2001, the Manager of the Village of Long Grove, Cal Doughty, introduced an amendment to the Village's Zoning Regulations, entitled, "An Ordinance Amending the Village Code Regarding Public Assemblies" (the "Assembly Ordinance"). The Ordinance restricts the size and capacity of buildings used for "public assembly," such as "religious institutions, aquariums, libraries, museums, private schools, and other similar uses," R.1-1, Ex.F at 1.[6] Specifically, it provides that a complex comprised of three buildings located on fifteen or more acres, but not fronting a state highway, cannot exceed a total square footage of 55,000.[7] It also imposes restrictions on parking, setbacks from the road and the flow of traffic. According to the Village Planning and Development Committee, the Ordinance is designed to preserve the status of the Village as a "low density, residential community," as desired by its residents, and to thwart the

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County to build a church complex on the property. Because Lake County Zoning Code requires neither a special permit nor rezoning of the property, at the time of the involuntary annexation Vision merely was awaiting approval of building plans by the Lake County Board. However, after the property was involuntarily annexed by the Village of Long Grove, Lake County no longer had jurisdiction to consider Vision's plans or to approve the building of the church complex.

[6] Although the Village Zoning Regulations detailed the standards governing the approval of a special use application, prior to the passage of the Assembly Ordinance, the Regulations did not specify maximum capacity or size or minimum lot size for buildings constructed on properties within the Village's jurisdiction.

[7] The permissible square footage is 100,000 if the complex is located on twenty or more acres and fronts a state highway; the permissible square footage decreases if the complex contains one or two, instead of three, buildings. *See* R.1-1, Ex.F at 1 (also imposing various regulations on parking and maximum lot coverage).

development of buildings that "defeat the very purpose of the scenic corridor." R.100, Ex.47 at 1-2. The Board enacted the Assembly Ordinance on April 9, 2002; it was incorporated as section 5-11-6.1 of the Zoning Regulations.

3. Vision's 2002 Application for a Special Use Permit

After its involuntary annexation, Vision's property was zoned by the Village "R2" Residential, which permits the construction of a religious facility with a special use permit. On January 23, 2002, approximately four months prior to the passage of the Assembly Ordinance, Vision applied for such a permit. However, instead of the 56,200-square foot complex discussed in March 2001 during negotiations over voluntary annexation, Vision requested approval in its special use application for a 99,000-square foot, 5-building, 1,000-seat sanctuary facility,[8] similar to the facility originally proposed in 2000.[9]

A public hearing was held on Vision's application in May 2002, after the passage of the Assembly Ordinance. The Plan Commission ultimately recommended the denial of Vision's request for a permit, given that the 99,000-square foot complex far exceeded the permissible square footage for a facility on property of this size and

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[8] *See also* Board Meeting Minutes, R.99, Ex.14 at 4 (describing the terms of the 2002 application); *see also* R.177-1, Ex.72 (comparing the 2001 and 2002 plans).

[9] In June 2002, Vision presented amended plans for an 80,000-square foot facility, but nevertheless asked the Plan Commission to vote on the 99,000-square foot proposal.

nature under the Assembly Ordinance. The Board accepted this recommendation on July 9, 2002.[10]

Because its building plans have not yet been approved by the Board, Vision temporarily has relocated to shared space in Mundelein United Methodist Church in Mundelein, Illinois.

B. District Court Proceedings

On August 18, 2003, Vision filed the present action in the United States District Court for the Northern District of Illinois; an amended complaint was filed in December 2004. Counts I, II and XI of the amended complaint challenge (1) the Village's denial of Vision's September 2000 application for annexation; (2) the Village's involuntary annexation of Vision's property in October 2001; (3) the Village's passage of the Assembly Ordinance in April 2002, limiting the size and capacity of buildings used for public assembly; and (4) the Village's denial of Vision's application for a special use permit in both 2000 and 2002. Vision alleged that these actions "constitute[d] an infringement of Vision's *First Amendment* right to the free exercise of religion," R.62 at 11 (Count I); violated RLUIPA's free exercise provision, which prohibits land use regulations that impose a substantial burden on religious exercise, *see id.* at 12 (Count II); and resulted in a "substantial[] burden[] [on] Vision's exercise of religion," in violation of the Illinois Religious Freedom Restoration Act of 1998, *id.* at 24 (Count XI). Counts III and IV allege a violation of the *First Amendment* Free Speech and *Establishment Clauses*. Counts V and VI allege that the Village violated the *Fourteenth Amendment Equal Protection Clause* and RLUIPA's "[e]qual terms" provision by

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[10] *See* Board Meeting Minutes, R.99, Ex.14 at 4 (describing the project as a "high-density proposal in a low-density community").

a. Allowing restaurants, tearooms, taverns and health clubs as permitted uses in certain zones, but providing no zone in which churches are permitted uses; and

b. Imposing more restrictive requirements upon Vision than those imposed upon the six churches operating in Long Grove.

c. Imposing more restrictive requirements upon Vision than those imposed upon the schools directly to the north of the subject property.

Id. at 15 (Count V); *id.* at 16 (Count VI).

Counts VII and VIII allege that, because the Village's Zoning Regulations "provide[] no zone in which Vision or another newly arrived or newly formed church may locate except by permission of the Village Board," they violate the *First Amendment* and RLUIPA's prohibition on the unreasonable exclusion of religious activity. *Id.* at 17 (Count VII); *id.* at 18 (Count VIII). Count IX alleges that the Village's denial of Vision's applications for a special use permit was arbitrary and capricious. *See id.* at 19-20 (claiming that the Village's denial of the 2001 permit application was unjustified, and that the denial of the 2002 permit application was unsupported by "any findings"). Finally, Count X alleges that Vision had a "vested right to build a church on [its] property" because it purchased the land on the "good faith" belief that building and operating a church was a permitted use of the land under the Lake County Zoning Code; according to Vision, by "[i]nvoluntarily annexing Vision's property with the result that Vision would not receive a building permit from Lake County," and by "[p]assing the [Assembly Ordinance] with the result that Vision's proposed use could not be allowed under the Long Grove zoning ordinance," the Village impermissibly interfered with Vision's vested right. *Id.* at 21.

Vision requested that the district court issue a declaratory judgment that "it may use its property in Long Grove as a permitted use under Lake County or Long Grove zoning code, whichever is least restrictive"; enjoin the Village from further interfering with use of its property; and award compensatory and punitive damages in the amount of $ 5,000,000. *Id.* at 12. It also sought the award of attorneys' fees and costs.

In October 2003, the Northern Illinois Conference of the United Methodist Church (the "Conference") and its Presiding Bishop, C. Joseph Sprague, moved to intervene as of right, *see Fed. R. Civ. P. 24(a)*, or permissively, *see id. 24(b)(2)*, for the purpose of "support[ing]. .. the causes of action" of its member congregation, Vision Church. *See* R.10 at 1. As the Conference explained, Vision's property in the Village

> is held subject to a trust clause in favor of the Conference and the larger denomination and is also subject to reversionary rights in favor of the Conference. Thus, any impairment of Vision Church's constitutional and statutory rights to build, occupy and worship on its land in Long Grove is, by necessity, an affront to the Conference's distinct legal interests as well.

Id. at 1-2. On April 5, 2004, the district court granted the Conference's motion to intervene as of right under *Rule 24(a)*.

On March 9, 2005, the Village filed a motion for summary judgment on all counts; on this same day, Vision filed a cross-motion for summary judgment on Counts I, II, IV, V, VI, VIII, IX and X. On October 18, 2005, the district court granted summary judgment in favor of the Village on all counts.

First, the district court held that Vision had not demonstrated a violation of the *Establishment Clause*. It classified Vision's challenge as directed exclusively at the Assembly Ordinance and held that the ordinance is "secular in purpose because it merely controls development, and not Vision's religious activities." R.157 at 12. It also found that the primary effect of the Assembly Ordinance is not to inhibit or advance religion; the court rejected the significance of the "temporal proximity between Vision's involuntary annexation and the passage of the Public Assembly Ordinance" and instead found dispositive the fact that the ordinance applies to *all* public use facilities, religious and non-religious alike, as well as that the Village did not "affiliate[] itself with one religion,. .. thereby taking sides against Vision." *Id.* at 13. For these same reasons, the court found no excessive entanglement with religion.

Second, the court concluded that the Assembly Ordinance does not violate the *Free Exercise Clause*. "[R]estriction[s] on the physical size of the proposed buildings" do not necessarily "restrict[] [] Vision's beliefs or customs." *Id.* at 15. The size restrictions in this case are traceable to neutral land planning goals; in addition, 55,000 square feet is "ample space to house a congregation of 140 adults and 80 children comfortably." *Id.*

The district court determined that Vision's RLUIPA claims fared no better. Section 2(a)(1) of RLUIPA prohibits the imposition of a "substantial burden on the religious exercise of a person, including a religious assembly or institution." *42 U.S.C. § 2000cc(a)(1)*. Applying this test, the district court held that Vision "did not incur a 'substantial burden' for purposes of the RLUIPA." R.157 at 18. Because it could have built a 55,000-square foot facility on the property, in compliance with the Assembly Ordinance, "it was Vision, not the Village," that ultimately is responsible for the church not being approved by the Plan Commission and the Board. *Id.* The court also

found that the "over fifty conditions" imposed on the "proposed development of the church complex" did not constitute a substantial burden on religious exercise because these conditions did not "render[] *any* religious exercise on the property effectively impracticable." *Id.* at 18-19 (emphasis added). Moreover, the conditions did not impact the Village's ultimate decision not to approve construction: Had Vision submitted a plan that complied with the ordinance's size restrictions, "there might be a church complex today." *Id.*

The district court similarly rejected Vision's claims with respect to RLUIPA § 2(b)(1), which prohibits the "impos[ition] or implement[ation] [of] a land use regulation in a manner that treats a religious. .. institution on less than equal terms with a nonreligious. .. institution." *42 U.S.C. § 2000cc(b)(1).* According to the district court, Vision has not "identified a non-religious group that has received more favorable treatment," given that "the Village. .. does not apply the [Assembly] Ordinance only to religious institutions, but evenly to all petitioners that come before the Plan Commission," including schools and existing churches within the Village. R.157 at 20.[11]

The district court next turned to Vision's *Fourteenth Amendment* equal protection claim. It held that the Assembly Ordinance is subject only to rational basis scrutiny because it is "facially neutral and generally applicable," *id.* at 24; it does not classify on the basis of race, gender, national origin or religion, but rather only distinguishes between public assembly and private locations. Further, the size limitations imposed by the Assembly

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[11] The district court recognized that the schools across the street from Vision's property are larger than 55,000 square feet; however, because they were "built in 1999, before the Public Assembly Ordinance was enacted," they were not subject to the same size restrictions as Vision. R.157 at 20.

Ordinance are rationally related to a legitimate government end -- that of carrying out the Village's "stated planning goals . . . for a quiet countryside, with an unhurried environment where families can enjoy the open space." *Id.* at 24.

Moreover, the court found that Vision had not demonstrated that "it is a class of one," who was "treated differently than others similarly situated" without a "rational basis for the difference in treatment." *Id.* at 22-23 (internal quotation marks omitted). Vision had claimed that, to build a restaurant or tavern, an owner need not obtain a special use permit, but a permit is required to build a church. However, according to the court, "these uses [are] only allowed in the Village's business district, as opposed to the Residential district where Vision wishes to build," demonstrating that Vision is not "similarly situat[ed]" to these institutions. *Id.* at 23. In sum, "Vision was treated the same under the Ordinance as any other developer" who sought to build a public assembly facility exceeding 55,000 square feet on a tract of land similar in size and location to Vision's property. *Id.* at 24.

The court also granted summary judgment to the Village on Vision's state law vested rights claim. Vision contended that it had purchased the 27 acres in reliance on the Lake County Zoning Ordinance, under which, at the time of purchase, "a church was a permitted use, as of right." *Id.* at 27 (internal quotation marks omitted). The district court rejected this claim. Vision's vested rights claim, it held, is grounded in the Lake County Zoning Ordinance and therefore both the complaint and the remedy sought is directed at the County; "[h]owever, Vision names only the Village in its suit." *Id.* Further, the court held that Vision could not "establish that there was a probability of municipal approval to build a church complex on its property," given that neither the Village nor Lake County had offered any assurances regarding the issue. *Id.*

Additionally, the district court rejected Vision's claim that the Village's denial of its application for a special use permit in 2002 was "arbitrary and capricious." *Id.* Not only is there "no evidence that raises more than a scintilla of evidence to show a genuine triable issue of material fact on this matter," but the Village cannot be sued for monetary relief under the Illinois Tort Immunity Act, *see 745 Ill. Comp. Stat. 10/2-104.*

Lastly, in a footnote, the district court granted summary judgment to the Village on Vision's "exclusion" claims. "There is no 'exclusion' clause in the *First Amendment*," the court concluded, "and therefore the court grants summary judgment on this Count." R.157 at 11 n.2.

Vision timely appealed.

II. DISCUSSION

We review the district court's grant of summary judgment de novo . *See Sornberger v. City of Knoxville, 434 F.3d 1006, 1012 (7th Cir. 2006).* In doing so, we must construe all facts and reasonable inferences in the light most favorable to the non-movant. *See id.* Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).*

A. Vision's "Exclusion" Claims

Vision first contends that the district court erred in holding that "[t]here is no 'exclusion' clause in the *First Amendment*" and that summary judgment was proper on Count VII. R.157 at 11 n.2. According to Vision, the Supreme Court previously has recognized that, when activity protected by the *First Amendment* is "excluded" by

municipal ordinance, the municipality must "advance[] sufficient justification" for its actions -- a requirement that, in turn, was codified in *RLUIPA § 2(b)(3)*. Appellant's Br. at 19 (discussing *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981)).*

In *Schad, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671*, the Supreme Court addressed the claims of an adult bookstore in Camden County, New Jersey, against the Borough of Mount Ephraim. Inside the bookstore were "coin-operated devices by virtue of which a customer could sit in a booth, insert a coin, and watch an adult film," *id. at 62*; the Borough found that this activity violated § 99-15B of its zoning ordinance, under which "nude dancing[] is not a permitted use in any establishment in [its jurisdiction]," *id. at 65* (internal quotation marks omitted). The bookstore challenged the "imposition of criminal penalties under [the zoning] ordinance," claiming that the prohibition on live entertainment "violated [its] rights of free expression guaranteed by the *First* and *Fourteenth Amendments of the United States Constitution*." *Id.* The Supreme Court agreed and held that the ordinance as applied to the bookstore was constitutionally infirm:

> Whatever *First Amendment* protection should be extended to nude dancing, live or on film,.. .. the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment. ... [A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.. .. The Village may serve

> its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with *First Amendment* freedoms.

Id. at 66, 68, 70 (internal quotation marks omitted). The Supreme Court concluded that the Borough had not justified adequately its substantial restrictions on live entertainment; there was no evidence, the Court found, to support the Borough's claim that live entertainment brings with it a host of problems, such as parking and trash. *Id. at 74* ("[T]his ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment, and it is not clear that a more selective approach would fail to address those unique problems if any there are."). In sum, *Schad* stands for the proposition that an "ordinance [that] completely prohibit[s] the expressive conduct at issue," *Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 716 n.21 (7th Cir. 2003),* must be supported by "sufficient justification," *Schad, 452 U.S. at 67*, and be narrowly tailored to that justification, *see id. at 68*.

A similar *First Amendment* protection, albeit limited to religious freedoms, is embodied in RLUIPA § 2(b)(3). *Section 2(b)(3)* prohibits a "government" from

> impos[ing] or implement[ing] a land use regulation that --
>
> > (A) totally excludes religious assemblies from a jurisdiction; or
> >
> > (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc(b)(3).[12]

It should be noted that the Village does not challenge the constitutionality of RLUIPA. *See also Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002)* (upholding RLUIPA against the claim that Congress exceeded its authority under the *Commerce Clause* when it adopted the legislation; also holding that RLUIPA's substantial burden, equal terms and exclusion provisions do not violate the *Free Exercise Clause of the First Amendment* but instead codify *First Amendment* jurisprudence); *Mayweathers v. Terhune, 2001 U.S. Dist. LEXIS 22300, 2001 WL 804140 (E.D. Cal. 2001)* (upholding RLUIPA's constitutionality). *Cf. Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003)* (in the context of a prisoner's rights case, upholding the constitutionality of *42 U.S.C. § 2000cc-1(a)*).

According to Vision, because "[n]owhere in Long Grove is a church a permitted use" but instead churches are "allowed only as [] special use[s]," and because the right to religious exercise therefore is "exercisable only at the discretion of local governmental officials," the municipality has excluded the development of religious institutions within its jurisdiction, in violation of the *First Amendment* protections recognized by *Schad* and of *RLUIPA § 2(b)(3)(A)*. Appellant's Br. at 19. We cannot agree. *Schad* applies only to the complete and total exclusion of activity or expression protected by the *First Amendment*. *See Schad, 452 U.S. at 76* ("Here, the Bor-

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[12] RLUIPA was enacted in the wake of the Supreme Court's decision in *City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)*, which invalidated the Religious Freedom Restoration Act of 1993 ("RFRA"), insofar as that Act regulated state as well as federal action, on the ground that it exceeded Congress' power under the enforcement clause of the *Fourteenth Amendment*.

ough *totally* excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the *First Amendment*." (emphasis added)); *id.* (distinguishing *Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976)*, on the ground that the Court in *Young* "did not purport to approve the *total exclusion* from the city of theaters showing adult, but not obscene, materials" (emphasis added)); *id. at 66* ("[T]he Mount Ephraim ordinance prohibits *all live entertainment* in the Borough: *no property* in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment" (emphasis added)); *see also Ben's Bar, Inc., 316 F.3d at 716 n.21* (classifying *Schad* as addressing an "ordinance [that] *completely prohibit[ed]* the expressive conduct at issue" (emphasis added)). The same is true of section 2(b)(3)(A) of RLUIPA. *See 42 U.S.C. § 2000cc(b)(3)(A)* (prohibiting the " *total[] exclu[sion]* [of] religious assemblies" (emphasis added)).

In the present case, the Village, by permitting churches in all residential districts as a special use, has not completely or totally excluded religious assemblies from its jurisdiction. Six churches currently operate within the Village. Moreover, Vision is permitted to build a church on the land as it is currently zoned, provided that it applies for a special use permit, complies with the procedures set forth in § 5-11-6(B) and (C) of the Village Zoning Regulations, and fulfills the standards governing the Board's consideration of a special use application set forth in § 5-11-6(D). Specifically, under § 5-11-6(D), the Board may grant a special use permit if the special use:

> 1. Is deemed necessary for the public convenience at that location;

> 2. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
>
> 3. Will not cause substantial injury to the value of other property in the neighborhood in which it is located; and
>
> 4. Except as may be recommended by the Plan Commission and approved by the Village Board and conforms, except in the case of a planned development, to the applicable regulations of the district in which it is to be located.

Zoning Regulations § 5-11-6(D), R.99, Ex.2. In addition, § 5-11-6.1, which codified the Assembly Ordinance, mandates that Vision's plans comply with certain size and capacity restrictions.

This case therefore is distinguishable from *Schad,* where the zoning code excluded all live entertainment as a permissible use in the Borough's business district and did not set forth a method by which to obtain a special use permit for this activity. *See Schad, 452 U.S. at 64-66.* Here, by contrast, if the conditions set forth in the Village's zoning code are fulfilled, a church may be built on property zoned for residential use. *Cf. R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 409 (7th Cir. 2004)* (holding that an ordinance permitting nude dancing only as a special use did not "amount[] to a total ban on protected activity," because it placed restrictions only on the *location* of such businesses). Thus, we conclude that the Village Zoning Regulations do not violate the *First Amendment* protections recognized in *Schad* or *RLUIPA § 2(b)(3)(A).*

This does not end our inquiry, however. *Section 2(b)(3) of RLUIPA* also prohibits a land use regulation

that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *42 U.S.C. § 2000cc(b)(3)(B).* As the legislative history evidences, "[w]hat is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations." 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). In this case, we cannot conclude that requiring Vision to obtain a special use permit to build and operate its church in a residential district "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *42 U.S.C. § 2000cc(b)(3)(B).* Vision's primary argument on appeal is that the Board's discretion in granting a special use permit is unbridled and therefore its consideration of Vision's application was unreasonable. We disagree. This is not a case where the "state [has] delegate[d] essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).* The Board's discretion is narrowly circumscribed by the Village's Zoning Regulations, which set forth the various factors to be considered by the Board in addressing an application for a special use permit. *See* Zoning Regulations § 5-11-6(D), R.99, Ex.2; *id.* § 5-11-6.1.

Even if the Zoning Regulations were to grant the Board undue discretion, this does not demonstrate the violation of *RLUIPA § 2(b)(3)(B).* The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals. As a general matter, special use designations are instruments of municipal planning that allow city officials to retain review power over land uses that, although presumptively allowed, may pose special problems. In this case in particular, the special use designation is substantially related to the municipal planning goals of limiting development, traffic and noise, and preserving open space; these goals, in turn, are reflected

in the Village's Comprehensive Plan, "which seeks to ensure that the semi-rural atmosphere of the community is maintained while simultaneously permitting a wide variety of quality development in character with the existing motif of the community." Comprehensive Plan, R.99, Ex.3 at 01-1. To carry out this goal, the Village also has required many secular institutions, including "[s]chools, elementary and high, including playgrounds and athletic fields," "[u]tility and public service uses," and "[n]ursing homes," to be approved as a special use in a residential district. Zoning Regulations § 5-4-2-2, R.99, Ex.2. Like these institutions, religious assemblies have a reasonable opportunity to build within the Village, provided that the requirements for a special use permit have been fulfilled.

B. *Establishment Clause*

Vision next contends that the district court erred in granting summary judgment to the Village on Count IV, its claim that the Assembly Ordinance and the "special-use standards" violate the *First Amendment's Establishment Clause*. Appellant's Br. at 44. The district court held that the Assembly Ordinance is secular in both purpose and effect and did not risk excessive entanglement with religion. Vision now responds that the Village's other land use regulations, and their application to Vision, violate the *Establishment Clause* because they "benefit[] existing religious institutions over new ones." *Id.*

The *First Amendment to the Constitution of the United States* provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion. .. ." *U.S. Const. amend. I, cl. 1.*[13] In evaluating an *Establishment Clause* claim, "[t]he touchstone for our analysis is

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[13] This provision is made applicable to the states and its political subdivisions, including municipalities, through the *Fourteenth Amendment*.

the principle that the '*First Amendment* mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU, 545 U.S. 844, 162 L. Ed. 2d 729, 125 S. Ct. 2722, 2733 (2005)* (quoting *Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968)).* "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central *Establishment Clause* value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary, 125 S. Ct. at 2733.* Specifically, a government policy or practice violates the *Establishment Clause* if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion. *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); see also McCreary, 125 S. Ct. at 2733* (reaffirming *Lemon* 's "three familiar considerations for evaluating *Establishment Clause* claims"). "The *Establishment Clause* also prohibits the government from favoring one religion over another without a legitimate secular reason." *Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005); see also Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1168-69 (7th Cir. 1993)* ("Under the *Establishment Clause*, the government may not aid one religion, aid all religions or favor one religion over another.").

Vision's primary argument is that, by imposing restrictions on the construction of new churches, including the size and capacity regulations set forth in the Assembly Ordinance and the findings required by § 5-11-6(D) of the Zoning Regulations, the Village discriminates against the "practices of new religious assemblies." Appellant's Br. at 44. According to Vision, these restrictions "make it easier for the adherents of one or more sects to practice their religions [while not] extend[ing] these benefits, however slight, to the adherents of other sects." R.89 at 3.

We agree with the district court that Vision has not demonstrated that the Village's land use regulations have no secular purpose, that their primary effect advances or inhibits religion or that they foster excessive entanglement with religion. We first address whether the applicable provisions -- the Assembly Ordinance and the special use standards -- have a secular purpose. "In determining whether a particular government action affecting a religious symbol has a secular purpose, a government's characterization of its purpose is entitled to deference," although courts "must ensure that the government's characterization is sincere." *Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 704 (7th Cir. 2005).* In the present case, the Village contends that the land use regulations are justified by the goals of the Village's Comprehensive Plan -- that of minimizing development and maximizing open space. Although we express some concern about the general course of events in this case,[14] we ultimately find this secular purpose to be "sincere." *Id.* The Comprehensive Plan discusses repeatedly the "semi-rural" nature of the Village, the community's emphasis on "open space," and the importance of conforming development to these goals. R.99, Ex.3 at 01-1. As the Plan itself states:

> Since its incorporation in 1956, the residents of Long Grove have diligently worked to develop and vigorously supported a comprehensive plan which seeks to ensure that the semi-rural atmosphere of the community is maintained while simultaneously permitting a wide variety of quality development in character with the existing motif of the community.. .. Preserving Long Grove's semi-rural

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[14] This case presents no claim that the Village has discriminated against Vision on the basis of race or ethnicity and, of course, we express no view on this issue.

> charm, while still permitting quality development, is the most important goal of this Comprehensive Plan.

Id. Further, in describing the Village's "Community Character," the Comprehensive Plan explains:

> Long Grove's unique community character sets it apart from adjoining communities. The most critical of the Village's goals are the provision of a quiet countryside, with an unhurried and unstructured environment where families can live and enjoy the open space, and the preservation of community character through Long Grove's consistent and long-standing efforts to maintain the qualities of such lifestyles.

Id. at 03-1. n14.

The land use regulations challenged by Vision are tailored to this secular purpose. The Assembly Ordinance applies to all buildings used for "public assembly," including not only "religious institutions," but also "aquariums, libraries, museums, private schools, and other similar uses." R.1-1, Ex.F at 1. It limits the size of these buildings not on the basis of their religious affiliation but on the basis of their location and acreage. For example, if a plot of land fronts a state highway, the owner can build a larger facility, in part because the state highway can handle the traffic demands of that facility; smaller plots that front only a county highway are more limited and must build a smaller facility. Similarly, the allegedly "discretionary special use process," Appellant's Br. at 45, is justified by the secular goal of facilitating municipal control of property uses that have a greater "impact. .. upon neighboring lands," Zoning Regulations § 5-11-6(A), R.99, Ex.2. The secular nature of the special use standards is

made evident by the Zoning Regulations themselves: They apply not only to "churches," but also to those property uses that "may give rise to unique problems with respect to their impact on neighboring property or public facilities," *id.* § 5-11-6(A)(2), including among other things "[s]chools," "[s]helters. . . for school bus transportation" and "[r]ecreational clubs," *id.* § 5-4-2-2(A), (B), (E).

Second, the land use regulations challenged by Vision do not have a primary effect of advancing or inhibiting religion, or, more specifically, advancing established churches over new churches. "In this prong, our focus is not on the intent of the City, but on whether a reasonable person, apprised of the circumstances surrounding the sale, would conclude that the sale amounted to an endorsement of religion." *Mercier, 395 F.3d at 705.* The primary question is "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Books v. City of Elkhart, 235 F.3d 292, 302 (7th Cir. 2000)* (internal quotation marks omitted).

We believe that a reasonable person would understand the effect of the Assembly Ordinance and special use requirements to be a limitation on Village development generally, not on religion specifically. Notably, Vision does not refute the claim that new churches *are* permissible under the Village's zoning ordinances; they, like other public assembly buildings, merely must abide by the size and capacity limitations set forth in the Assembly Ordinance and, like other special uses, comply with the procedures set forth in § 5-11-6 of the Zoning Regulations. Nor does Vision make a compelling argument that these limitations are so unreasonable as to demonstrate a *First Amendment* violation. Although Vision requested in 2002 that the Board vote on its plans for a 99,000-square foot facility, it previously had prepared plans for a 56,200-square foot facility, which is only 1,200 square feet larger than the largest church facility allowable under

the Assembly Ordinance. According to the record before us, a 55,000-square foot facility would fulfill the needs of Vision's 120-member (albeit growing) congregation: Under its 56,200-square foot plan, Vision's facility would have consisted of three main buildings and a 600-seat sanctuary, and was estimated to be able to serve a congregation of between 800 and 1,000 persons.[15] In sum, Vision -- and other new churches -- reasonably and without hardship could operate within the size and capacity restrictions imposed by the Village; we therefore conclude that the Ordinance does not have a primary effect of advancing or inhibiting religion.

The same is true of the standards governing the issuance of a special use permit. Vision does not contend that, had it met the size limitations imposed by the Assembly Ordinance, it would have been denied a special use permit because of the balancing of factors under § 5-11-6 of the Village's Zoning Regulations. Nor can it cite an example of a church denied a special use permit, when it already had fulfilled the requirements imposed by the ordinance. Further, Vision fails to establish that the requirements imposed on "new churches" are unreasonable or otherwise impermissible: Indeed, to accept Vision's position would be to hold that a municipality could *never* change its zoning regulations with the effect of mandating that new churches, and other institutions, fulfill requirements not imposed on churches previously constructed -- a position we simply cannot accept. Given that the zoning requirements are applied equally to secular and religious institutions alike and permit the construction of both institutions under certain, limited circumstances, we believe that "no reasonable person would be-

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[15] *See also* discussion *infra* at 42 (discussing whether, in the context of *RLUIPA § 2(a)(1)*, these limitations are reasonable).

lieve that [the effect of the zoning ordinances] was to advance religion." *Mercier, 395 F.3d at 705.*

We now turn to *Lemon* 's third factor, whether the municipality has entangled itself excessively with religion. Vision contends that the Village has become involved intimately in the religious exercise of its churches, including the "size and aesthetics of their worship facilities, the hours of operation, and the scheduling of religious activities." Appellant's Br. at 45. To be sure, the Village's Plan Commission, during early negotiations with Vision over voluntary annexation, requested that Vision consent to a number of conditions on construction, including limitations on the future development of church facilities and on the number and scope of religious activities. *See* R.98, Ex.14 at 2 (requesting that Vision restrict "outside activities" in the playing field); *id.* (requesting that Vision agree to hold "[o]nly two services Sunday or holidays excepting weddings and funerals. And no more than one major activity each week Monday through Friday, excepting weddings and funerals").[16]

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[16] It cannot be argued plausibly that these conditions, which are applications of a municipal policy, are not "laws" or legislative actions within the scope of the *Establishment Clause*. The *Establishment Clause* states that "Congress shall make no law respecting an establishment of religion." *U.S. Const. amend. I.* This constitutional provision has been applied to the states through the *Fourteenth Amendment* and has been interpreted as "imposing. .. substantive limitations on the legislative power of the States and their political subdivisions." *Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000).* However, although the conditions requested by the Village and rejected by Vision do not involve the exercise of the municipality's "legislative power" per se, *id.*, but rather more fairly are classified as the interpretation by the municipality of policies already enacted by its legislative body, the scope of the *Establishment Clause* has been interpreted broadly by the Supreme Court and the courts of appeals. For example, in *Allegheny County v. ACLU, 492 U.S.*

However, to establish excessive entanglement with religion, Vision must demonstrate "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 393, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990)* (internal quotation marks omitted). This inquiry requires examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* (internal quotation marks omitted). Moreover, the advancement or inhibition of religion must be more than de minimis. *See Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997).* The general rule is that, to constitute excessive entanglement, the government action must involve "intrusive government participation in, su-

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573, 612, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), the Supreme Court held unconstitutional the placement of a cr che in the lobby of a courthouse, even though this conduct did not involve the exercise of legislative authority and did not even "command or prohibit conduct," *Glassroth v. Moore, 335 F.3d 1282, 1293 (11th Cir. 2003)* (discussing *Allegheny County*). *See Allegheny County, 492 U.S. at 612* ("To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the logic of secular liberty it is the purpose of the *Establishment Clause* to protect." (internal citations and quotation marks omitted)). The same is true of *Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992)*, in which the Supreme Court held that, "[a] school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id. at 587.* In sum, under these precedents, so long as the conduct is "attributed to" the government entity or municipality, *id.*, it is subject to the constitutional limitations of the *Establishment Clause.*

pervision of, or inquiry into religious affairs." *United States v. Indianapolis Baptist Temple, 224 F.3d 627, 631 (7th Cir. 2000)* (discussing the taxation of religious institutions).

We cannot conclude that the conditions on construction requested by the Village in the course of negotiations over annexation with Vision rise to the level of excessive entanglement. First, the condition limiting future development is wholly secular in nature and consistent with the goals of maximizing open space and limiting Village development set forth in the Comprehensive Plan. Notably, a similar agreement was required of the public elementary schools built across the street from Vision's property, as a condition of annexation and a special use permit. Second, the condition limiting use of the outdoor area on Vision's plans marked "playing fields" also is secular in nature. Members of the Plan Commission expressed concern that this land, if unrestricted, would be used for "carnivals or similar activities"; they instead wanted the land, consistent with the general goals of maximizing the ratio of development to open space in the Village, to remain "permanently unbuildable," such that it would "mirror the Fields of Long Grove," a large open area on the other side of the road. R.98, Ex.11 at 2. These neutral concerns do not impermissibly involve the municipality in the religious affairs.

The third condition -- the request that Vision limit its Sunday services to two, excepting weddings and funerals, and limit its "major activit[ies]" during the week to one per week -- could be somewhat more problematic. *See Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 702 (7th Cir. 2003).* However, in its meetings discussing these conditions, the Commission defined a "major activity" as a non-"religious event[]" that "anticipate[s] [the] use[] of more than 50 percent of the parking spaces." R.98, Ex.11 at 3. Reading the record as a whole, it appears that the Commission's primary concern was traffic

control, rather than controlling the congregation's religious worship. In any event, the issue is not ripe for extended analysis. These conditions were raised by the Village during late 2000 negotiations over annexation; they were not raised again after the involuntary annexation of Vision's property in proceedings related to Vision's application for a special use permit in 2002. If this matter were to arise again in proceedings related to Vision's next application for a special use permit, the Church of course would be free to raise the issue anew.

C. Free Exercise of Religion

Vision also contends that the district court erred in dismissing its free exercise of religion claims under the *First Amendment* and RLUIPA. The district court held that the Village had not imposed any restriction on Vision's practices or beliefs; Vision now responds that "a number of the Village's actions" nevertheless "constitute a substantial burden [on the exercise of religion] by causing delay, uncertainty and expense." Appellant's Br. at 21 (internal quotation marks omitted).

"Under the *Free Exercise Clause of the First Amendment of the United States Constitution*, made applicable to state and local governments by the *Fourteenth Amendment*, no law may prohibit the free exercise of religion." *Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762-63 (7th Cir. 2003)* (hereinafter " *CLUB* "). The *Free Exercise Clause*, the Supreme Court has noted, "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Jimmy Swaggart Ministries, 493 U.S. at 384* (internal quotation marks omitted). The relevant inquiry is two-fold. First, we examine whether the law being challenged is "neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S.*

520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). If not, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id. at 531-32.* This does not end the inquiry, however: "[A] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion," in which case there must be "a compelling governmental interest justif[ying] the burden." *Jimmy Swaggart Ministries, 493 U.S. at 384-85* (internal quotation marks omitted).

The protections embodied by the *Free Exercise Clause* were codified in *RLUIPA § 2(a)(1),* which prohibits the government from

> impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution --
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Simply put, both the *Free Exercise Clause* and RLUIPA provide that, if a facially-neutral law or land use regulation imposes a substantial burden on religion, it is subject to strict scrutiny.

Given the similarities between *RLUIPA § 2(a)(1)* and *First Amendment* jurisprudence, we collapse Vision's claims for the purpose of this analysis; this approach

seems most consistent with post-RLUIPA case law.[17] Our sister circuits have defined RLUIPA's substantial burden provision by reference to the Supreme Court's free exercise jurisprudence, finding this case law to be "instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA ." *Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004)*; *see also Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006)*. Similarly, RLUIPA's legislative history indicates that the term "substantial burden" was intended to be interpreted by reference to *First Amendment* jurisprudence:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.. .. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

146 Cong. Rec. S7774-01 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

Interpreting RLUIPA, we have held that a land use regulation imposes a "substantial burden" on religious exercise if it "necessarily bears direct, primary, and fun-

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[17] Regardless, Vision's arguments on both legal theories are the same. *See* Appellant's Br. at 21-29.

damental responsibility for rendering religious exercise -- including the use of real property for the purpose thereof within the regulated jurisdiction generally -- effectively impracticable." *CLUB, 342 F.3d at 761.* Similarly, interpreting the *First Amendment,* the Supreme Court has found a "substantial burden" to exist when the government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987)* (internal quotation marks omitted).[18] With this analytical framework in mind, we now turn to Vision's specific arguments.

Vision's primary arguments on appeal are that it was "substantially burdened" by (1) the involuntarily annexation of its property, which it claims was done with the intent to "thwart Vision's church," Appellant's Br. at 24; (2) the Village's conditions on annexation; and (3) the passage of the Assembly Ordinance.[19]

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[18] This definition has received further definition by the lower federal courts. *See, e.g., Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988-89 (9th Cir. 2006)* ("[F]or a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." (internal quotation marks omitted; alteration in original)); *Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)* ("We have held that an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion.").

[19] Vision makes two additional claims. First, it contends that the differential treatment of it and the public schools across the street constitutes a "substantial burden" on its religious exercise. Appellant's Br. at 23. This claim more appropriately is addressed in the context of Vision's equal protection and RLUIPA equal treatment claims. *See infra.* Second, Vision

Vision's claim as it relates to involuntary annexation does not state a valid cause of action under *RLUIPA § 2(a)(1)*. That section forbids a government agency to "impose or implement a *land use regulation* in a manner that imposes a substantial burden on the religious exercise of a person," *42 U.S.C. § 2000cc(a)(1)* (emphasis added); "land use regulation," in turn, has been defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land," *42 U.S.C. § 2000cc-5(5)*. "Under this definition, a government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest." *Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2002)*. The process of annexation, whether voluntary under *65 ILCS 5/7-1-8* or involuntary under *65 ILCS 5/7-1-13*, may indeed make possible the subsequent zoning or marking of the land; however, an annexation statute is not itself a "zoning" or "landmarking" regulation and its application therefore does not constitute government action covered by RLUIPA.

We cannot conclude that either the Village's denial of Vision's application for annexation or its subsequent involuntary annexation of Vision's land constitutes a violation of the *Free Exercise Clause of the First Amendment.*

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discusses extensively the uncertainty and expense caused by the zoning and approval process. We recognize that Vision purchased its land in 1999 and, seven years later, still is seeking permission to build on the land. However, we remind the plaintiff that "the federal courts are ordinarily not vehicles to review zoning board decisions," and, in the absence of evidence tying the Board's actions to intentional discrimination, we decline to overturn the Board's decision on this basis. *Harding v. County of Door, 870 F.2d 430, 432 (7th Cir. 1989).*

As we noted in *CLUB*, "no *Free Exercise Clause* violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest." *CLUB, 342 F.3d at 763*; *Midrash Sephardi, 366 F.3d at 1227* ("[W]e agree that 'substantial burden' requires something more than an incidental effect on religious exercise.").

In this case, both annexation statutes are wholly neutral and apply generally to all property owners seeking annexation and to all persons owning property bounded on all sides by property within the municipality. *See 65 ILCS 5/7-1-8, 13.* To be sure, the Village admits that, in invoking its powers under *65 ILCS 5/7-1-13*, it sought to control the future development of Vision's property; but there is no evidence that Village desired such control *because* Vision is a *religious* institution or a religious institution of a certain denomination. Nor is there evidence that the effects of the Village's actions were anything more than incidental: The record evidence indicates that it is not because of the denial of the 2000 application for annexation or because of the 2001 involuntary annexation that Vision's church currently is not being constructed; rather, it is because of Vision's refusal to abide by the size restrictions imposed by the Assembly Ordinance that it later was denied a special use permit to construct a church on its land.

Vision next alleges that the Village improperly imposed conditions on its annexation and approval for a special use permit. This claim is covered by both RLUIPA and by the *First Amendment Free Exercise Clause.*[20]

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[20] Vision's argument in effect challenges the application of municipal standards governing the approval of property for a special use, contained in § 5-11-6(D) of the Village Zoning Regulations; these standards are part of a "zoning law" covered by RLUIPA. The same is true of Vision's challenge to the con-

However, as we explained in the context of the *Establishment Clause*, we ultimately conclude that these conditions -- which included limitations on future development, on the use of a particular outdoor area, and on Sunday and weekly activities -- are no more than incidental burdens on the exercise of religion. Our analysis in *CLUB* is instructive. There, we rejected the plaintiff's suggested interpretation of "substantial burden," holding that, under such an interpretation, "the slightest obstacle to religious exercise incidental to the regulation of land use -- however minor the burden it were to impose -- could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means." *342 F.3d at 761.* Similarly, here, we find that the conditions on construction impose only a minor burden on Vision's operations: The first two conditions are neutral and traceable to municipal land planning goals. The latter condition, limiting activities at the church, is more troublesome, as previously noted. However, a burden must be more than a mere inconvenience to rise to the level of a constitutional injury; it must place "significant pressure" on Vision to "forego religious precepts" or to engage in "religious conduct." *Midrash Sephardi, 366 F.3d at 1227.* Because there is no evidence that these conditions affected the Village's later decision to forcibly annex the property, to enact the Assembly Ordinance and ultimately to deny Vision's 2002 application for a special use permit, we cannot conclude on this record that Vision has demonstrated a substantial burden.[21] n21 Notably, the record indicates that, had Vision complied with maximum size requirements imposed by the Public Assembly Ordinance, there likely would be a church complex currently

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stitutionality of the Assembly Ordinance, which amended the Village's Zoning Regulations.

[21] *See also* discussion *supra* at 33-34.

being constructed, notwithstanding its rejection during earlier negotiations of limitations on future development, worship services and other institutional activities.

Lastly, we turn to Vision's contention that the enactment of the Assembly Ordinance constitutes a "substantial burden" on its right to the free exercise of religion. The Assembly Ordinance is facially neutral; it applies to the new construction of *all* public use buildings, regardless of their purpose, including not only "religious institutions," but also "aquariums, libraries, museums, private schools, and other similar uses," R.1-1, Ex.F at 1. According to Vision, despite its neutrality, the Ordinance was passed for the sole purpose of forcing Vision to reduce the size of its proposed complex, which, in turn, substantially burdens Vision's potential success. Besides temporal proximity between Vision's dispute with the Village over a special use permit and the enactment of the Ordinance, there is no evidence in the record to support this claim. Even if Vision was targeted by the Assembly Ordinance, this does not mean that it was targeted *because of religion*: The Plan Commission was concerned about the size of the church complex and its effect on the character of the Village, concerns separate and independent from the religious affiliation (or lack thereof) of the institution seeking to build on the land.

Moreover, there is no triable issue of fact with respect to whether the size, capacity and other restrictions imposed by the Ordinance constitute a non-incidental, substantial burden on the exercise of religion. Under the ordinance, Vision would be permitted to build a 55,000-square foot facility. As mentioned previously, [22] experts estimate that a facility of this size would be able to meet

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[22] *See supra* at 29.

the needs of an 800 to 1,000 member congregation.[23] Vision currently has 120 members. Although we recognize that Vision plans to grow in size, we cannot fathom a situation in which limiting the church to a three-building, 55,000-square foot facility would impose an unreasonable and substantial burden on religious exercise; the congregation would have to increase eight-fold to reach its maximum capacity. Notably, the second set of plans proposed by Vision in the course of early negotiations totaled 56,200 square feet and consisted of three main buildings (a sanctuary, an administration building and a Sunday school building), a 600-seat sanctuary, and 240 parking spaces. Unlike in *New Berlin*, where the Appellant would have been required to find "[an]other parcel of land on which it could build its church, *" City of New Berlin, 396 F.3d at 899*, in this case, Vision was free to submit modified plans to the Board that could have "cure[d] the problems and deficiencies cited by the Board," *Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 188 (2d Cir. 2004)* (finding no "substantial burden" where this same opportunity was available to the plaintiff).

D. Equal Protection

We next address Vision's claim that the district court erred in dismissing its equal protection claims under the *Fourteenth Amendment Equal Protection Clause* and RLUIPA's equal terms provision. Vision contends that the Village "applied its laws to treat Vision differently

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[23] Specifically, Vision's expert estimated that a 40,000-square foot facility would accommodate a congregation with an average Sunday worship attendance of 500; in turn, average worship attendance typically is 60-80 of the total membership. Vision's expert further estimated that a facility of 75,000 square feet would be appropriate for a church with an average worship attendance of 1,000, and a membership of 1,250 to 1,600 people.

from other assembly uses similarly situated or prima facie identical in all relevant respects." Appellant's Br. at 42. Specifically, Vision argues that it was treated less favorably than "restaurants, tearooms, taverns and health clubs," which are permitted uses in some zones, while churches are not permitted uses in any zone, *id.*; further, Vision contends that it was treated less favorably than the "schools just across [the] road from Vision's property" because, although they submitted identical petitions for a special use permit, the school's application was granted and Vision's was denied, *id.* Because the legal framework for analyzing Vision's *Fourteenth Amendment* and RLUIPA claims differ, we address each in turn.

1. ***Fourteenth Amendment***

The *Equal Protection Clause of the Fourteenth Amendment* commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," *U.S. Const. amend. XIV*, which essentially is a direction that all persons similarly situated should be treated alike, *Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).* If a statute or municipal ordinance classifies by race, alienage, or national origin, we subject the legislative action to "strict scrutiny and [it] will be sustained only if [it is] suitably tailored to serve a compelling state interest"; "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).* Heightened scrutiny also is appropriate when government action interferes with a person's fundamental rights, such as freedom of speech or religion. *See Eby-Brown Co., LLC v. Wisconsin Dep't of Agric., 295 F.3d 749, 754 (7th Cir. 2002).* If "no suspect class or fundamental right is involved," however, "we employ a rational basis test to determine whether the legislative act is constitutional." *Id.*

The municipal ordinances challenged by Vision do not classify on the basis of race, alienage or national origin. Further, as we conclude above, the Village's Zoning Regulations and the Public Assembly Ordinance do not discriminate on the basis of religion. We therefore apply only rational basis scrutiny to Vision's equal protection claims. *See Locke v. Davey, 540 U.S. 712, 720 n.3, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)* (holding that, where the challenged government action did not constitute a "violation of the *Free Exercise Clause*," only "rational-basis scrutiny" was warranted). In other words, Vision must demonstrate "governmental action wholly impossible to relate to legitimate governmental objectives." *Patel v. City of Chicago, 383 F.3d 569, 572 (7th Cir. 2004)* (internal quotation marks omitted). In pertinent part, to meet this standard, Vision must demonstrate "malicious conduct" on the part of government officials, or "conduct that evidences a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." *Id. at 573* (internal quotation marks omitted).

This Vision cannot do. Vision points out that the Village's Zoning Regulations classify "restaurants, tearooms, taverns and health clubs" as permissible uses in business districts, while churches require a special use permit in residential districts. But, like churches, schools also are not permissible uses in residential districts, demonstrating that the distinction between permissible and special uses is not rooted in animosity towards religious institutions. *See* Zoning Regulations § 5-4-2-2, R.99, Ex.2. Further, the distinction can be traced to legitimate municipal land planning goals. The special uses in residential districts identified by the Zoning Regulations (i.e., schools, churches and recreational clubs) and the special uses in business districts (i.e., restaurant patios) raise unique concerns such as traffic control, noise pollution, and a greater impact on the landscape than more common uses. As the Third Circuit observed, "a municipality may chart out a quiet place where yards are wide, people few, and

motor vehicles restricted[.] [These] are legitimate guidelines in a land-use project addressed to family needs." *Congregation Kol Ami v. Abington Township, 309 F.3d 120, 135 (3d Cir. 2002)* (internal quotation marks omitted). Given these justifications for differential treatment, we cannot conclude that municipal officials acted "malicious[ly]" or irrationally. *Patel, 383 F.3d at 573.*

Vision also suggests that it was irrational for the Village to deny its application for annexation and a special use permit, while granting an identical application in July 1999 from Kildeer School District for the annexation of land and permission to build public elementary schools across the street from Vision's property. We cannot characterize these decisions as "wholly impossible to relate to legitimate governmental objectives." *Id. at 572.* Public schools serve a unique public function, and, given the discretion municipalities enjoy over annexation, *see Barefoot v. City of Wilmington, 306 F.3d 113, 121, 37 Fed. Appx. 626 (4th Cir. 2002),* it certainly was not irrational for the Village to want the School District's land to be within its municipal boundaries for the purpose of serving its students. Further, conditions on construction similar to those imposed on Vision, including a limitation on future development, were placed on the School District. *See* R.100, Ex.41 at 7-8. While Vision resisted the Village's request, the School District willingly agreed. In light of these considerations, approving the annexation of the School District's property while denying the annexation of Vision's property was not irrational. The same is true of the denial of Vision's special use application in 2002:[24] At

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[24] Vision compares its application for a special use permit in 2000 to the elementary school's similar application in July 1999. However, because Vision's application for annexation was denied by the Village in 2000, the Village did not have jurisdiction to grant or deny the special use permit; it never addressed or took action on this application. Thus, for the purpose of the above analysis, we consider only whether the Village's denial of Vision's 2002 application for a special use permit lacked ra-

the time that Village addressed Vision's special use application, it already had passed the Assembly Ordinance, imposing size and capacity limitations on the construction of a building used for public assembly. To deny Vision's application because it failed to submit plans that complied with these restrictions is rationally related to the goals reflected in the Assembly Ordinance.

Vision also raises a "class of one" equal protection claim. "We ha[ve] recognized equal protection claims brought by a 'class of one,' although we have acknowledged that it is difficult to succeed with such a claim." *Maulding Dev., LLC v. City of Springfield, 453 F.3d 967, 969 (7th Cir. 2006)* (internal quotation marks omitted; alteration in original). To establish a "class of one" claim, Vision must show that: "(1) it has been intentionally treated differently from others similarly situated; and (2) there is no rational basis for the difference in treatment or the cause of the differential treatment is a totally illegitimate animus toward [Vision]." *Id. at 970* (internal quotation marks omitted).

Vision cannot show that it was treated less favorably than an institution similarly situated. "[R]estaurants, tearooms, taverns and health clubs," Appellant's Br. at 42, are not similarly situated: They are permitted uses in the Village's *business district*; by contrast, the church is zoned "Residential." The apt comparison would be to "[s]ingle-family detached dwellings" and "[a]gricultural operations," which are "permitted uses" in residential districts, *see* Zoning Regulations § 5-4-2-1, R.99, Ex.2, but Vision fails to make this comparison. Vision also is not similarly situated to the two elementary schools operated by the Kildeer School District. In evaluating the requests for a special use permit, Vision and the schools both were subject to the inquiry mandated by § 5-11-6(D) of the Zoning Regulations, which examines whether the special use

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tional basis.

"is deemed necessary for the public convenience" and will "protect[]" "public health, safety and welfare." *Id.* § 5-11-6(D). In July 1999, this issue was the sole inquiry mandated by the Zoning Regulations, and the Village determined that the schools were appropriate special uses. When the Village considered Vision's application for a special use permit in May 2002,[25] however, these standards had changed slightly: To obtain a special use permit, Vision also needed to comply with the size and capacity restrictions imposed by the Assembly Ordinance, which had been passed by the Village Board the month prior. Because the prevailing standards for granting a special use permit in 1999 and in 2002 differed, we cannot find Vision to be similarly situated to the schools for the purpose of class of one analysis.

2. RLUIPA Equal Terms

"For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence." *Konikov v. Orange County, 410 F.3d 1317, 1324 (11th Cir. 2005).* Instead, the pertinent question is whether the "land use regulation. .. treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." *42 U.S.C. § 2000cc(b)(1).* Although this court has not yet had an opportunity to explore fully the contours of RLUIPA's equal terms provision, the Eleventh Circuit recently set forth comprehensively what it described as the

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[25] *See supra* note 24 (limiting the court's analysis to the rejection of Vision's 2002 special use application, and explaining that the Village never acted on Vision's earlier request for a special use permit because it lacked jurisdiction over Vision's property).

> three distinct kinds of Equal Terms statutory violations: (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1308 (11th Cir. 2006) (hereinafter "*Primera*").

With respect to *RLUIPA § 2(b)(1)*, Vision challenges only the special use permit requirements; it does not claim that the Assembly Ordinance also violates the statute. But the Zoning Regulations, particularly the section addressing special uses, does not "differentiate[] between religious and nonreligious assemblies or institutions." *Id.* Nor does the facially neutral ordinance nevertheless target religion through religious "gerrymander[ing]." *Id.* Lastly, we cannot find that the special use requirements were "selectively enforced" against Vision Church, such that Vision was treated less favorably than another, nonreligious institution. As explained above, the comparison between Vision and the restaurants and tearooms that are considered permitted uses in the business district is not persuasive. Further, although under *RLUIPA § 2(b)(1)* a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects, as required under equal protection jurisdiction, the fact that Vision and the elementary schools were subject to different standards because of the year in which their special use applications were considered compels the conclusion that there was no unequal treat-

ment. *Cf. id. at 1310* ("[T]he School is simply not a valid comparator here because the rezoning process is an entirely different form of relief from obtaining a variance." (internal quotation marks omitted)).

E. State Law Supplemental Claims

Vision argues that, as a matter of state law, the Village arbitrarily and without reference to defensible standards rejected its 2002[26] application for a special use permit. We cannot accept this argument. Vision focuses in its brief on the special use standards set forth in § 5-11-6(D) of the Zoning Regulations. Specifically, Vision claims that it "satisfied all the criteria necessary for issuance of a [permit]," Appellant's Br. at 35; it also challenges the special use regulations as lacking "defensible standards," *id.* at 37 (internal quotation marks omitted). Even if this were true, however, Vision was not denied a special use permit on the ground that the church would "cause substantial injury" to neighboring properties or that it otherwise was not "necessary for the public convenience," or because it failed to meet another criteria set forth in the Zoning Regulations. Zoning Regulations § 5-11-6(D), R.99, Ex.2. Rather, the permit was denied because Vision had submitted plans for the construction of a 99,000-square foot facility, which is 44,000 square feet larger than that allowed under the Public Assembly Ordinance. We already have determined that this legislation is constitutional, and there is no evidence that its application to Vision was arbitrary or capricious.

Vision also claims that the district court erred in granting summary judgment to the Village on its state

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[26] As in the context of Vision's equal protection claims, we limit our consideration of Vision's claims to the Village's denial of Vision's application for a special use permit in May 2002. *See supra* notes 24-25.

law vested rights claim. The district court held that, even if Vision had fulfilled the elements of a vested rights claim, the proper course of action was to sue Lake County, not the Village; further, it found that Vision could not "establish that there was a probability of municipal approval to build a church complex on its property." R.157 at 27.

We understand why Vision has directed its claim at the Village rather than the County. Its argument proceeds as follows: It had a right, when it purchased the property, to construct a church under Lake County Zoning Code; it relied on this right in purchasing the property; upon involuntary annexation by the Village, *see 65 ILCS 5/7-1-13*, this right was taken away because the property no longer was subject to Lake County's zoning jurisdiction; therefore, the Village is required to allow Vision to "complete the construction and [to] use the premises for the purposes originally authorized." Appellant's Br. at 30 (internal quotation marks omitted).

Nevertheless, Vision has not established a valid vested rights claim under Illinois law. Illinois courts generally recognize that "there is no vested right in the continuation of a zoning classification. " *Furniture L.L.C. v. City of Chicago, 353 Ill. App. 3d 433, 818 N.E.2d 839, 843, 288 Ill. Dec. 904 (Ill. App. Ct. 2004)*. However, the Illinois Supreme Court has held:

> [W]here there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance, such party has a vested property right and he may complete the construction and use the premises for the purposes originally authorized, irrespective of subsequent zoning or a change in zoning classifications.

Pioneer Trust & Savings Bank v. Cook County, 71 Ill. 2d 510, 377 N.E.2d 21, 26, 17 Ill. Dec. 831 (Ill. 1978) (internal quotation marks omitted). As a result, Illinois courts have found that, where a plaintiff purchases and invests in property believing in good faith that it will receive a building permit, the city cannot amend zoning classifications to the builder's detriment, making unavailable the intended use of the land. *See, e.g., Furniture L.L.C., 818 N.E.2d at 846.*

However, there is no Illinois case law applying the vested rights doctrine under the present circumstances -- where a plaintiff has relied to its detriment on a county zoning ordinance, but sued *a different* government entity, the municipality, for the disruption of this expectation. As a federal court exercising supplemental jurisdiction over this claim, we must be reluctant "to expand state law" in this fashion. *J.S. Sweet Co. v. Sika Chem. Corp., 400 F.3d 1028, 1034 (7th Cir. 2005).*[27] n27 Moreover, to expand Illinois law to create a remedy in this case would render *65 ILCS 5/7-1-13* meaningless. Title *65 ILCS 5/7-1-13* sets forth the limited conditions under which involuntary annexation is permissible; because Vision's property is bordered on all sides by property within the Village's corporate boundaries, the Village was authorized to involuntarily annex the property under the terms of the statute. Under Vision's proposed rule, the Village -- and all other Illinois municipalities -- effectively would be stripped of the authority to annex *any* land that already is zoned for development under county zoning code, contrary to the obvious intent of the Illinois state legislature. *See also IDX Sys. Corp. v. Epic Sys. Corp., 285 F.3d 581, 586-87*

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[27] *Cf. Dausch v. Rykse, 52 F.3d 1425, 1438 (7th Cir. 1994)* (Ripple, J., concurring) ("[F]ederal courts sitting in diversity ought to be circumspect in expanding the law of a state beyond the boundaries established in the jurisprudence of the state.").

(7th Cir. 2002) (noting that "our task is to implement state law as state courts would implement it" and holding that, if we believe that state courts would find a "conflict" between the interpretation urged by the parties and a state statute, that interpretation must be invalidated). Because we believe that an Illinois state court would not interpret a common law doctrine in a manner that neutralizes the meaning of a state statute, we cannot adopt the interpretation of the vested rights doctrine advanced by Vision.

Conclusion

For the reasons set forth in the foregoing opinion, we affirm the judgment of the district court.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 05-4144 & 05-4234

VISION CHURCH,
Plaintiff-Appellant,

v.

VILLAGE OF LONG GROVE,
Defendant-Appellee.

January 10, 2007, Decided

ORDER

Upon consideration of Appellants' petition for rehearing en banc, filed on November 21, 2006, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

APPENDIX D

106th CONGRESS

2d Session

AN ACT

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-
(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.
(2) SCOPE OF APPLICATION- This subsection applies in any case in which--
(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
(B) the substantial burden affects, or removal of that sub-

stantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-
(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--
(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

***

APPENDIX E

LONG GROVE ZONING ORDINANCE
§ 5-11-17
SPECIAL USE PERMITS

***

(E) Standards for Special Use Permits.

1. General Standards. No special use permit shall be recommended or granted pursuant to this section unless the owner shall establish that:

(a) Is deemed necessary for the public convenience at that location;

(b) Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

(c) Will not cause substantial injury to the value of other lots in the neighborhood in which it is located;

(d) Conforms to the applicable regulations of the district in which it is to be located, except as may be recommended by the plan commission and approved by the village board or, except in the case of a planned development; and

(e) Owner can demonstrate, to the satisfaction of the village, that it has the capability and capacity, including, without limitation, the technological, personnel, and financial resources, to complete the project as proposed.

***

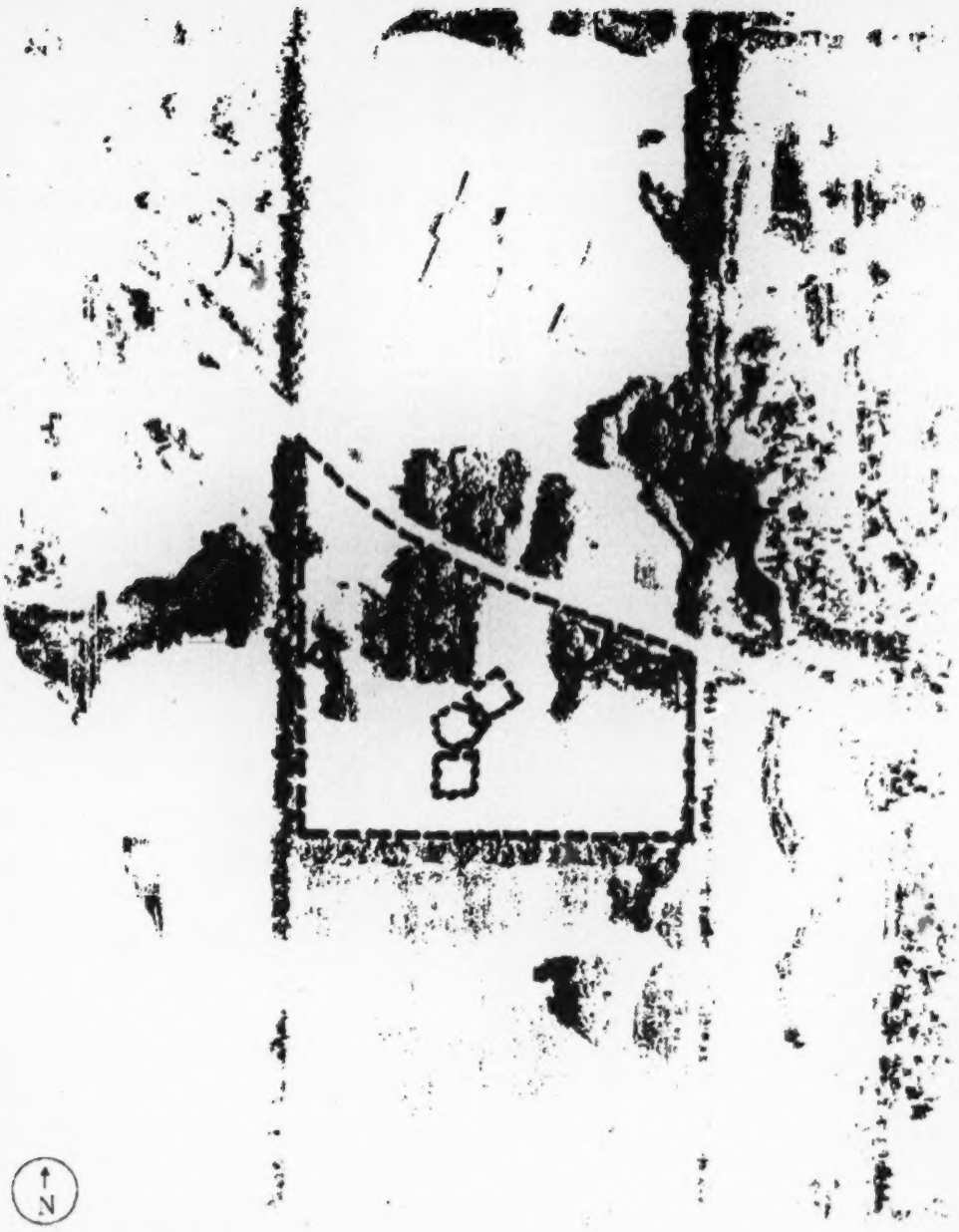
APPENDIX F

LONG GROVE ZONING ORDINANCE
§ 5-11-6.1

AN ORDINANCE
AMENDING THE VILLAGE CODE
REGARDING PUBLIC ASSEMBLIES

PUBLIC ASSEMBLIES: When and if permitted as a special use in the respective zoning district, public assembly uses, such as religious institutions, aquariums, libraries, museums, private schools, and other similar uses, shall confirm to, in addition to all other applicable Village Code provisions, the following:

	Neighborhood Facility	Community Facility	Regional Facility
		***	
Where Located	Front on any public street	Front on county or state highway	Front on state highway
Maximum Square Feet of Buildings	11,000	[1] building 35,000 [2] buildings 45,000 [3] buildings 55,000	[1] building 60,000 [2] buildings 80,000 [3] buildings 100,000
		***	



Aerial photo of Victor's property (Lot A to C) compounded with approximate location of proposed Church buildings and boundary lines depicted by solid-dash lines. The School Complex is seen across the Street

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(2)

No. 06-1497

FILED
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OFFICE OF THE CLERK
SUPREME COURT U.S.

In The
Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, et al.,

Petitioners,

v.

VILLAGE OF LONG GROVE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Summary of Argument

The Village of Long Grove is an 18-square mile community located in Lake County, Illinois. The Village is known for its unique community character and semi-rural planning philosophy. In April 2002, the Village enacted a neutral and generally applicable Public Assembly Ordinance to regulate the location and size of public assembly uses, including both religious institutions and secular assembly uses. Under the size limits set forth in Public Assembly Ordinance, Petitioner could have obtained zoning approval for a 55,000 sq. ft. complex dedicated to religious use at its preferred site in the Village. Petitioner's own architect, who specializes in designing religious institutions, testified that a complex of this size was more than sufficient for Petitioner's 220-person congregation and any realistic future growth of that congregation.

Following the Village's enactment of the Public Assembly Ordinance, Petitioner never sought approval of a facility that complied with the limit on facility size set forth in the Public Assembly Ordinance, nor did it ever seek an amendment to the Ordinance. Instead, Petitioner demanded that the Village vote on its proposed 99,000 sq. ft. complex. It is undisputed that a complex of that size could not be approved under the limits set forth in the Public Assembly Ordinance. Consistent with the terms of

the Public Assembly Ordinance, the Village denied Petitioner's application.

Significantly, the Village did not deny Petitioner its preferred site. The Public Assembly Ordinance merely regulated the size of Petitioner's proposed religious complex, in the same manner as the Ordinance regulated the size of secular assembly-type facilities in the Village. The Seventh Circuit determined that this land use regulation did not violate the Free Exercise Clause, Equal Protection Clause, or the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Seventh Circuit's decision was not based upon an idiosyncratic interpretation of these constitutional and statutory provisions, nor does the outcome in this case conflict with any other religious land use case decided by a federal appellate court. Rather, by all generally accepted interpretations of the Constitution and RLUIPA, the Village's conduct did not violate Petitioner's rights.

Petitioner's Applications and the Village's Actions

Petitioner's recitation of the facts surrounding its applications materially departs from the discussion of facts contained in the opinions of the Seventh Circuit and the District Court, and from the record compiled in this case. The distortions begin with Petitioner's discussion of events that led to its purchase of the property. For example, when Petitioner was searching for property to purchase, it is not true that the Village Manager and Petitioner's pastor "agreed on a fourth property, which the Manager said was 'the best place to build a church in Long Grove.'" Pet. at 3. *See* Village's Local Rule 56.1(b)(3)(a) Resp. to Pl.'s Amend. Statement of Facts, ¶¶ 91-96 (referencing the

depositions of both the Village Manager and Petitioner's pastor). Indeed, the 27.4-acre property purchased by Petitioner in September 2000 (the "Property") was not even *in* the Village of Long Grove; it was located in unincorporated Lake County, Illinois. *Vision Church v. Village of Long Grove*, 468 F.3d 975, 981 (7th Cir. 2006).

Under Illinois law, Petitioner could have sought development under the County's development ordinances, but it chose to pursue a different course: annexation into the Village. *Id.* at 982. Annexation is not the exercise of land-use authority. Rather, it is the means by which Illinois municipalities secure jurisdiction over property, and a municipality's authority to annex is governed by state statute. "Voluntary" annexation, which Petitioner pursued in 2000 and 2001, is prescribed by 65 ILCS 5/7-1-8. Illinois grants its municipalities wide latitude in negotiating the terms of annexation by way of binding annexation agreements, whose contract-like terms may include provisions relating to the zoning and future development of the property proposed to be annexed. *See* 65 ILCS 5/11-15.1-1 *et seq.*; *Langendorf v. City of Urbana*, 754 N.E.2d 320, 323-24 (Ill. 2001); *Gaylor v. Village of Ringwood*, 842 N.E.2d 1241 (Ill. App. Ct. 2006).

In Petitioner's June 2000 application for annexation, it requested annexation and zoning approval of a 99,000 sq. ft. facility, including a sanctuary that would seat 1,000. *Vision Church* at 982.[1] In the course of negotiations with the Village, Petitioner proposed to reduce its initial,

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[1] At this time, Petitioner's congregation consisted of 220 (140 adults and 80 youth and children), *see* Village's Local Rule 56.1(a)(3) Statement of Facts, ¶ 78 (referencing Petitioner's own December 2000 presentation), not 300 (the number set forth in the Petition). *See* Pet. at 2.

"Phase I," development to 56,200 sq. ft., including a sanctuary that would seat 600. *Id.* As negotiations continued, the Village asked Petitioner to clarify its plans and state whether or not it would agree to certain development conditions, including: (i) a restriction on future development beyond the proposed 56,200 sq. ft. and (ii) limitations on the number of weekly events, which was suggested by the Village Manager as a way to address concerns regarding traffic and parking. In an August 6, 2001 letter to the Village, Petitioner declined to accept these proposed conditions of annexation. *Id.* at 982. With negotiations at a stalemate, on August 7, 2001, the Village Plan Commission voted to recommend denial of Petitioner's application for annexation. On August 14, 2001, that recommendation was accepted by the Village Board. *Id.* at 982-83.[2]

While Petitioner was pursuing annexation, a neighboring property owner ("Valenti") was also negotiating with the Village to annex his 128-acre parcel, on which he intended a residential development. The Valenti annexation was approved by the Village on October 9, 2001. *Id.* at 983.[3] As a result of the annexation of the Valenti parcel, the Property became fully surrounded by the

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[2] Contrary to Petition's hyperbole, *see* Pet. at 4, the record contains absolutely no evidence that "local residents" viewed Petitioner and its plan "with suspicion" because its congregation was Korean-American. Nor is there any evidence of "some remarks" having "racial overtones." Notably, neither the Seventh Circuit's opinion, nor the District Court's opinion, contains any discussion of these mysterious and inflammatory allegations.

[3] The Seventh Circuit noted that "Vision alleges that the Village 'accelerated public hearings and development approvals' for Valenti's annexation application." *Id.* at 983 n. 4. *See also* Pet. at 6 ("the city [sic] fast-tracked approval of [the Valenti] annexation and 'residential' rezoning"). Although ultimately immaterial, the Village disputes this allegation and the Seventh Circuit made no findings as to its truth.

Village's corporate boundaries. *Id.* Under Illinois law, *see* 65 ILCS 5/7-1-13, the annexation of the Valenti parcel provided the Village with the opportunity to "involuntarily" annex the Property, which the Village did, pursuant to the statute, in October 2001. *Id.* After annexation, the Village classified the Property as "R2" Residential. The R2 zoning classification, which Petitioner had sought in its voluntary annexation petition, allowed Petitioner to seek approval for its proposed religious complex by way of a Special Use Permit. *Id.*[4]

In November 2001, the Village Manager introduced the Public Assembly Ordinance as a proposed amendment to the Village Code. Before then, Village's standards for granting Special Use Permits (codified at § 5-11-6(D) of the Village Code) did not include specific numeric limits on the size of assembly uses. Given the issues raised by Petitioner's application for annexation, the Village Manager thought it appropriate to propose a comprehensive Public Assembly Ordinance that would regulate with specificity the size of all new public assembly uses. Consistent with accepted planning principles, the proposed Public Assembly Ordinance linked the maximum size of a proposed complex to the type of road that would serve the complex. For example, assembly uses that fronted state highways were permitted to be larger than those that fronted county highways or village roads.

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[4] While Petitioner was pursuing its annexation application with the Village, it was also seeking development approval from Lake County. Involuntary annexation into the Village terminated Petitioner's Lake County application. *Id.* at 983 n. 5.

The Public Assembly Ordinance was passed in April 2002.[5] "The Ordinance restricts the size and capacity of buildings used for 'public assembly' such as 'religious institutions' . . . " *Vision Church* at 983. As applied specifically to the Property (which fronts a county road), the Ordinance "provides that a complex comprised of three buildings located on 15 or more acres, but not fronting a state highway, cannot exceed a total square footage of 55,000." *Id.* at 984.

Petitioner badly misstates the legislative history of the Ordinance and its impact on Petitioner's ability to develop the site. *See* Pet. at 7. According to both the Village's professional planner and Petitioner's own architect, the 55,000 sq. ft. limit did not cramp Petitioner's reasonably anticipated expansion. Rather, it allowed Petitioner to construct a complex that *would more than meet its current and future needs. See* Pl's Summary Judgment Exhibit Book III, Tab 61 (Kendig Deposition) at 131-49; Village's Local Rule 56.1(a)(3) Statement of Facts, ¶¶ 73-75, 78-81 (referencing deposition of church architect Tobias). On this factual point, the Seventh Circuit unequivocally agreed, saying

> experts estimate that a facility of this size would be able to meet the needs of an 800 to 1000

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[5] In April 2007, the Village comprehensively amended its Zoning Code. The provision entitled Standards for Special Use Permits reproduced in Appendix E of the Petition was previously codified as § 5-11-6(D) and was re-codified as § 5-11-17(E). At the time of passage, the Public Assembly Ordinance was codified as § 5-11-6.1. In the April 2007 comprehensive amendment, the Ordinance was re-codified as § 5-9-12. The version of the Ordinance that appears in the Petition as Appendix F has been edited and is incomplete. Appendix A to this Response contains the full version of the Ordinance at the time of passage.

> member congregation. Vision currently has 120 members. Although we recognize that Vision plans to grow in size, we cannot fathom a situation in which limiting the church to a three-building, 55,000 sq. ft. facility would impose a substantial burden on religious exercise; the congregation would have to increase eight-fold to reach its maximum capacity.

Vision Church at 999-1000.

As the Seventh Circuit opinion also makes clear, subsequent to enactment of the Public Assembly Ordinance, Petitioner never presented a proposal for a complex in the 55,000 sq. ft. range. The 56,200 sq. ft. proposal that Petitioner made in 2001 in connection with its request for annexation was never re-submitted to the Village.[6] Petitioner's proposal for a *99,000 sq. ft* complex was the *only* proposal that Petitioner put on the table in 2002. *Id.* at 984 n. 9. Of course, that proposal was almost double the size allowed under the Public Assembly Ordinance and was, accordingly, denied by the Village. *Id.*

Petitioner chastises the Seventh Circuit for "simply assum[ing] that Vision would have received approval for a 55,000-square foot complex even though the Village had just denied Vision's 56,200-square foot proposal." Pet. at 9-10. Petitioner's criticism is misplaced. The 56,200 sq. ft. proposal (with no commitment to forgo future expansion), made in conjunction with Petitioner's request for annexation, was denied in August 2001. But by April 2002, when

---

[6] Even that proposal was presented merely as an initial phase of development and the original annexation negotiations broke down because Petitioner *refused* to commit to no future expansion of the facility.

the Village reviewed Petitioner's application for a Special Use Permit, the landscape had significantly changed: (i) the Property had been annexed in the Village, and (ii) the Village had established specific standards for the size of proposed assembly uses. Given the concrete standards set forth in the Public Assembly Ordinance, the Seventh Circuit concluded that "under the [Public Assembly Ordinance], Vision would be permitted to build a 55,000-square foot facility." *Vision Church* at 999.

However, in 2002 Petitioner never sought approval of the proposed 56,200 sq. ft. complex, nor of any facility that complied with the 55,000 sq. ft. limit. It was, at that time, insisting on a *99,000* sq. ft. complex.

The Church and the Public Schools

Petitioner takes exceptional liberties in comparing itself to neighboring public schools built in 1998/1999, prior to the time Petitioner applied for annexation. Petitioner's rendition of the development of these public schools flatly misstates the crucial facts.[7]

Community School District No. 96 (the "School District") owned the 70-acre property on which the public schools were built. At the time of construction, the School District's property was located *outside* of the Village, in unincorporated Lake County. Unlike Petitioner, the School

[7] Petitioner asserts that "in all material respects (except for being smaller), Vision's special use proposal was identical to proposals filed by the local school district for an enormous school complex across the street from Vision's land. * * * Like Vision, the schools district had approached Long Grove for annexation, residential zoning and a special use permit." Pet. at 3.

District did not request that the Village annex the property prior to development. Rather, because its property was unincorporated, the School District properly built its schools under applicable County and State regulations and without regard to the Village's zoning code. *See* Pl's Summary Judgment Exhibit Book II, Tab 41; Village's Local Rule 56.1(a)(3) Appendix of Exhibits (Kendig Dep., pp. 83-84) and Supplemental Appendix of Exhibits (Doughty Dep., pp. 59-61). Further, given the size of the School District's property (over 60 acres), the Village lacked statutory authority to involuntarily annex the property. *See* 65 ILCS 5/7-1-13 (involuntary annexation limited to properties of no more than 60 acres).

Only *after* construction of the school *outside* the Village did the School District approach the Village about annexation. Given that the schools were *already built* and the School District was *willing to agree to certain restrictions on further development if the property were annexed*, the Village voted to approve the annexation. *Vision Church* at 1001, 1003.

The Seventh Circuit also noted that the School District "serve[s] a unique public function." *Vision Church* at 1001. To put a sharper point on this observation, school districts in Illinois are units of local government, Ill. Const. Art. VII, § 1, and the State legislature has placed limits on the authority of municipalities like the Village to control development on public school properties. *See* 105 ILCS 5/2-3.12, 5/3-14.21(d). Thus, the School District and Petitioner were in far different positions *vis-à-vis* the Village's land use authority under State law.

In sum, Petitioner's suggestion that its proposal was "identical" to the School District's proposal ignores both the

nature of the two uses (public schools, compared to a private assembly use), and nature of the zoning requests (requested annexation *after* construction with *agreed* conditions on future development, compared to requested annexation *before* construction *without* agreed conditions on future development). The two proposals were fundamentally different, and the school development cannot be a "valid comparator" to Vision's proposed project. *Vision Church* at 1003.

REASONS FOR DENYING THE PETITION

Although Petitioner asserts that this case exposes great rifts among the lower courts, this is pure exaggeration. Federal appellate courts are not in conflict regarding the meaning and application of the Free Exercise Clause, Equal Protection Clause, and RLUIPA when deciding cases involving proposed religious land uses and municipal zoning laws. Despite some differences in the language used by the appellate courts, the decisions of the Seventh Circuit are entirely consistent with decisions of the Second, Third, Ninth, and Eleventh Circuits.

The facts in this case – including the significant fact that Petitioner was not denied its preferred site, but was merely limited in the size of its proposed development – led to a decisive ruling in favor of the Village. That ruling was not the product of a unique interpretation of the Constitution or RLUIPA by the Seventh Circuit. It was, rather, a ruling fully consistent with First Amendment and Equal Protection decisions of this Court, and with the decisions of other appellate courts in cases with similar fact patterns.

I. The Seventh Circuit Application of RLUIPA's "Substantial Burden" Provision is Fully Consistent With That of Other Circuits.

Contrary to Petitioner's entreaties, there is no "square circuit conflict" between the courts of appeal on the meaning or application of RLUIPA's "substantial burden" provision.[5] *See* Pet. at 11-12. Further, whatever semantic differences exist in the language employed by the courts of appeal, *no* Circuit has found a RLUIPA "substantial burden" violation where a religious institution has been allowed to operate at its preferred site, and has been "burdened" merely by a limit on the size of its proposed complex.

Petitioner's assertion that a wide conflict exists in the interpretation of "substantial burden" is built upon a straw man: the accusation that the Seventh Circuit employs an "effectively impracticable" standard which, according to Petitioner, places it at odds with other Circuits, like the Ninth and Eleventh Circuits, that supposedly employ a "more lenient" standard. *See* Pet. at 11-14. This argument grossly simplifies the Seventh Circuit's approach in "substantial burden" cases, ignores that other Circuits have approvingly cited Seventh Circuit cases, and ducks the question of whether a different standard would lead to a different outcome in *this* case.

A. The Seventh Circuit's "Substantial Burden" Rulings.

In RLUIPA cases, the Seventh Circuit's "substantial burden" analysis begins with *Civil Liberties for Urban*

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[5] 42 U.S.C. § 2000cc(a)(1).

Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"). In *CLUB*, the plaintiffs raised a facial challenge to Chicago's zoning ordinance, which required religious uses to obtain Special Use Permits in areas of the city zoned "B" (business) and "C" (commercial), and excluded religious uses from areas zoned "M" (manufacturing). *Id.* at 754. With respect to RLUIPA's "substantial burden" provision, the plaintiffs alleged that these restrictions either deprived religious institutions of their preferred locations (in circumstances when the permit was denied) or, at the least, made it more difficult for religious institutions to find land and obtain zoning approval. *Id.* at 761.

The Seventh Circuit noted that the plaintiffs' proposed interpretation of "substantial burden," *i.e.*, "*any* regulation that inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise," *id.* at 761, would render meaningless the word "substantial." *Id.* The Seventh Circuit went on to hold that a land-use regulation imposes a "substantial burden" only if it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." *Id.*

Applying this analysis, the Seventh Circuit found that Chicago's Special Use requirements may well make land acquisition more difficult or more costly for religious institutions, but those "burdens" were the same ones faced by secular developers, and the city's overall treatment of religious uses demonstrated that religious institutions were able to locate and acquire sites in the city. To find a violation of RLUIPA in these circumstances would result in a "free pass" for religious institutions and place religious institutions in a *superior* position vis-à-vis comparable

secular uses. *Id.* at 761-62. Therefore, the Seventh Circuit concluded, Chicago's zoning ordinance did not impose a "substantial burden" on religious institutions.

The Seventh Circuit next addressed RLUIPA's "substantial burden" provision in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), a case that Petitioner tellingly neglects to mention in its Petition. In *City of New Berlin*, the plaintiff sought planned development ("PUD") approval to locate a church on property it had purchased in the city. *Id.* at 898. To alleviate concerns that the property might be sold to another user if the church could not raise the necessary funds to construct its facility, the church agreed to several planning conditions designed to prevent any other use of the property. *Id.* Notwithstanding the recommendation of the city's director of planning, the city council rejected the church's proposal based on the assertion that the proposed concessions did not protect the city in the event of certain contingencies. *Id.* at 898-99. The district court found no "substantial burden," but the Seventh Circuit reversed.

As Judge Posner wrote, "the district court judge inferred from language in [*CLUB*] that to satisfy [the 'substantial burden'] requirement the Church would have to show that there was no other parcel of land on which it could build its church." *Id.* at 899. But the Seventh Circuit rejected this interpretation of *CLUB* and the district court's "substantial burden" test. Instead, it held that, even though other sites might be available, the city's land-use decision, which denied the church its preferred site, *did* constitute a "substantial burden" because the reasons for denial offered by New Berlin were disingenuous and

could not be justified by sound land planning principles. *Id.* at 899-900.[9]

Judge Posner also authored *Petra Presbyterian Church v. Village of Northbrook*, ___ F.3d ___, 2007 WL 1628113 (7th Cir.) (June 7, 2007), a case decided after the present Petition was filed. With respect to the interpretation of "substantial burden," *Petra Presbyterian* involved a church that was denied its preferred site because the site in question was located in an industrial park where no assembly uses, religious or secular, were allowed. *Id.* at *2, *5. Commenting generally on the "substantial burden" test, the Seventh Circuit said "unless the requirement of substantial burden is taken seriously, the difficulty of [a municipality] proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind." *Id.* at *5.

In discussing Petra's specific claim, Judge Posner invoked both *CLUB* and *City of New Berlin*. *Id.* at *5. Drawing on *CLUB*, the Seventh Circuit held that "when there is plenty of land on which religious organizations can build churches . . . in a community, the fact that they are not permitted to build everywhere does not create a substantial burden." Citing *New Berlin,* the Seventh Circuit noted an exception to this rule when a religious institution has a reasonable expectation of obtaining zoning approval and the denial of the requested permit is "so utterly groundless as to create an inference of religious discrimination." *Id.* Because Petra had no reasonable

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[9] Given the outcome in *New Berlin*, Petitioner's comment that "Vision, like every other religious group to which the Seventh Circuit . . . has applied [its version of the 'substantial burden'] test failed to establish a substantial burden" *see* Pet. at 12 is patently untrue.

expectation of obtaining zoning approval at the site in question but had other opportunities to locate and build within the Village of Northbrook, and because excluding assembly uses (including religious institutions) from industrial parks was not an "utterly groundless" land-use decision, the Seventh Circuit found no "substantial burden" on the exercise of religion. *Id.*

Unlike *CLUB*, *New Berlin,* and *Petra*, this is not a case about *denial* of a preferred location; it is about a limitation on the *size* of a facility at a preferred location. Nevertheless, the Seventh Circuit's decision in this case fits squarely within the principles articulated in its *CLUB*, *New Berlin,* and *Petra* decisions. Most significantly, Petitioner has other options, including the ability to construct a smaller facility suitable for its current congregation as well as any reasonably anticipated growth. *Vision Church* at 999-1000. Moreover, application of the Village's neutral, generally applicable, Public Assembly Ordinance was not an "utterly groundless" reason to deny the Special Use Permit as was the case in *New Berlin*.

In conclusion, the Seventh Circuit's "substantial burden" decisions have not been based upon rote application of an "effectively impracticable" standard. They have been fact-based and nuanced. In determining whether a "substantial burden" has been imposed, the above cases have taken into account a variety of information, including the availability of alternative sites and alternative configurations, as well as the soundness of the municipality's basis for denial. As discussed below, these are the very same considerations employed by the other Circuits.

B. The Other Circuits Follow the Same Principles as the Seventh Circuit in "Substantial Burden" Cases.

In an attempt to create the illusion of a circuit split, Petitioner selectively quotes from various "substantial burden" cases, but rarely discusses how these cases were *decided*, and fails to note that the principles used to decide cases, as well as the actual rulings, are fully consistent with the Seventh Circuit's principles and decisions.

For example, the Eleventh Circuit has *not* "explicitly repudiated" the Seventh Circuit's RLUIPA "substantial burden" decisions as Petitioner argues. Pet. at 13. Rather, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004), the Eleventh Circuit, just like the Seventh Circuit in *CLUB*, found *no* "substantial burden" when a synagogue was denied its preferred site, while sites within other zoning districts were amply available. The same holds true for the Ninth Circuit which found no substantial burden when a religious college was denied its preferred location. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (commenting that "our holding is entirely consistent with the Seventh Circuit's recent ruling in [*CLUB*]").

Likewise, *Guru Nanak Sikh Soc. v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), is fully consistent with the Seventh Circuit's decision in *New Berlin* insofar as that the plaintiffs in those two cases were given what can only be called "the runaround." When those plaintiffs attempted to comply with the municipalities' suggestions and address the municipalities' stated concerns, the plaintiffs were met with suspect denials that were at odds with sound planning principles. *See Guru Nanak*, 456 F.3d at 989-92 (distinguishing *San Jose Christian* based upon

the fact that the County of Sutter's conduct could be taken as an indication that no approval would ever be granted). Petitioner asserts that *Guru Nanak* "starkly conflicts" with the Seventh Circuit's decision in *Vision Church* because Petitioner faced "easily as much (if not more) uncertainty as to whether future permit applications would be successful." Pet. at 15-16. Not true. The Seventh Circuit concluded that a religious complex meeting the 55,000 sq. ft. limit "likely would be" approved by the Village and, therefore, there was no uncertainty about Vision's ability to locate at its preferred site if it simply complied with the specific standards contained in the Public Assembly Ordinance. *Vision Church* at 999.

Moreover, the common thread in the *Midrash* and *Guru Nanak* decisions lies in those courts' desires to prevent substantial burdens from being imposed upon religious exercise, precepts or beliefs. *See also Thiry v. Carlson,* 78 F.3d 1491 (10th Cir. 1996).

In *Midrash*, the Eleventh Circuit held that a substantial burden is a "pressure that tends to force adherents to *forgo religious precepts.*" In *Guru Nanak*, the Ninth Circuit defined substantial burden as one that is "oppressive" to a significant great extent, or imposes a significantly great restriction or onus *upon religious exercise*. And, in *Thiry*, the Tenth Circuit concluded that a substantial burden is one that has a "tendency to coerce individuals into *acting contrary to their religious beliefs*," or one that "significantly inhibits or constrains, meaningfully curtails, or denies *reasonable opportunities for religious practices.*" The Village's conduct in the present case did not violate any of these yardsticks of substantial burden.

Rather than distancing itself from these rulings, the Seventh Circuit favorably cited them as refining the definition of "substantial burden" in religious land-use cases. *See Vision Church* at 997, n. 18. Consistent with these definitions, the Seventh Circuit found that the Village neither caused Petitioner to forgo its religious precepts, greatly restricted its religious exercise, forced Petitioner to act contrary to its religious beliefs, nor denied Petitioner reasonable opportunities to engage in religious practices. *Vision Church* at 999. As the Seventh Circuit found, Petitioner had a reasonable opportunity to continue the practice of its religion at its chosen site simply by complying with the 55,000 sq. ft. limitation contained in the Assembly Ordinance. *Id.* But Petitioner chose not to.

Finally, the Village notes that the only other Circuit case where *size* of the religious complex, not site, was the main issue, was decided in the same manner as *Vision Church*. *See Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 188 (2nd Cir. 2004). In that case, the Second Circuit concluded that there was no substantial burden when the village turned down a religious day school's zoning petition, but a smaller facility might well have satisfied the municipality's concerns.

In conclusion, the supposed split in the resolution of RLUIPA "substantial burden" cases, as argued by Petitioner, turns out not to be a chasm at all. Instead, when deciding these cases, the various Circuits have relied upon similar principles, and the outcome of the cases, though based upon distinct individual fact patterns, dovetail nicely.[10] The Seventh

[10] These RLUIPA "substantial burden" decisions are also consistent with the outcomes in series of pre-RLUIPA Circuit decisions where the courts were called upon to adjudicate zoning disputes between municipalities and

(Continued on following page)

Circuit's *Vision Church* decision fits within established patterns thereby obviating the need for this Court's review.[11]

II. There Is No Need for The Court to Clarify RLUIPA's "Less Than Equal Terms" Provision.

Just as there is no conflict among the circuits with respect to RLUIPA's "substantial burden" provision, there is no "substantial tension between the decisions of the Seventh and Eleventh Circuits interpreting RLUIPA's

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religious institutions and found no First Amendment violations when zoning approval was denied. *See, e.g., Rector, Wardens & Members of the Vestry v. City of New York*, 914 F.2d 348 (2nd Cir. 1990); *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983). *Cf. Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988) (finding violation of the First Amendment when denial of zoning approval effectively excluded mosque from city).

[11] Petitioner asserts that the Seventh Circuit's approach "also conflicts in principle with the Court's own 'substantial burden' decisions." Pet. at 17. Significantly, RLUIPA's "substantial burden" language constitutes a statutory, not constitutional, standard. In cases involving neutral and generally applicable laws and ordinances, which the Seventh Circuit found to be the case here, the constitutional test is rational basis, not "substantial burden." *See Employment Division v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as unconstitutional as applied to the States). Congress' selection of the "substantial burden" standard raises questions regarding the constitutionality of RLUIPA, but those are beyond the scope of the Seventh Circuit's opinion. In addition, although the foregoing discussion debunks Petitioner's claim that there is a split in the Circuits, the Village also notes that since this Court has issued no controlling "substantial burden decisions" in a religious land use context, the Seventh Circuit's *Vision Church* decision does not conflict with any decision of this Court.

equal terms provision." Pet. at 19. In any event, this case – which involves allegations of "less than equal" treatment of a religious assembly use as compared to *public schools*, and in which the church and the public schools projects were reviewed under different circumstances – should not be the vehicle for resolving any uncertainties about RLUIPA's "less than equal terms" provision.[12]

To begin with, it is doubtful that public schools fall within the class of "nonreligious assembl[ies] or institution[s]" that municipalities must treat on "equal terms" as compared to religious institutions. While the "equal terms" provision of RLUIPA was designed to put religious uses on a par with *private* secular assembly uses (*e.g.*, social clubs, lodges, union halls), there is no reason to believe that RLUIPA unequivocally equates religious institutions with public schools, *see, e.g.*, *Vision Church* at 1001 ("public schools serve a unique public function"), and no case has so held.

Even if, in general, religious institutions may not be treated on "less than equal terms" as compared to public schools, the Seventh Circuit's decision makes clear why there was no RLUIPA violation in this case: "Vision and the elementary schools were subject to different standards because of the year in which their special use applications were considered compels the conclusion that there was no unequal treatment." *Vision Church* at 1003 (*citing Primera Iglesia Bautista Hispana of Boca Raton v. Broward County*, 450 F.3d 1295, 1310 (11th Cir. 2006)). That is, the Special Use Permit for the School District, which governed future development of the already constructed schools,

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[12] 42 U.S.C. § 2000cc(b)(1).

was approved by the Village in July 1999, *more than two years* before the neutral and generally applicable Public Assembly Ordinance was enacted in April 2002.[13] The fact that the schools were *already built* at the time the School District applied for annexation and a Special Use permit is additional conclusive proof that the relief sought by Petitioner and the School District was not equivalent.

The Seventh Circuit's *citation and reliance* upon *Primera Iglesia,* an Eleventh Circuit decision, should put to rest any suggestions of a "tension" between the circuits. Indeed, in *Primera Iglesia* the Eleventh Circuit found no "equal terms" violation because the plaintiff church and the allegedly comparable private school were required to go through *very different zoning approval process* (a re-zoning for the school, versus a variation for the church) and "the 'rezoning' process is an entirely different form of relief from obtaining 'a variance'." *Id.* 450 F.3d at 1301, 1310.[14] Rather than demonstrating tension, the facts and conclusion in *Primera Iglesia* are entirely consistent with the facts and conclusion in *Vision Church.*

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[13] To the extent Petitioner suggests that the Village's very adoption of the neutral and generally applicable Public Assembly Ordinance was a violation of the "less than equal terms" provision simply because it altered the existing regulatory landscape, *see* Pet. at 20, that argument finds no support by any court.

[14] The same is true of the approval processes faced by Petitioner and the District. The schools were built at a time when the School District's property was physically outside the Village's boundaries and, therefore, beyond any Village control. As a result, the statutory "approval" process that the schools went through bore no resemblance to the special use process applicable to Petitioner. *Vision Church* at 1001-02. Further, the Village's authority over development activities of a public school are substantially limited by Illinois statute. *See* 105 ILCS 5/2-3.12, 5/3-14.21(d).

III. There Is No Need for The Court to Clarify the Meaning of the Equal Protection Clause, Especially When Petitioner Brought, and Lost, Claims Under the First Amendment.

After disposing of Petitioner's RLUIPA and First Amendment claims, the Seventh Circuit subjected Petitioner's remaining equal protection claim to rational basis scrutiny. *Vision Church* at 1001. Although, Petitioner asserts that "this case provides the Court with an opportunity to resolve a circuit conflict" as to the appropriate level of scrutiny for equal protection claims, *see* Pet. at 21, this Court has already done so.

In *Locke v. Davey*, 540 U.S. 712 (2004), the plaintiff brought claims under both the religion clauses of the First Amendment *and* the Equal Protection Clause. The Court disposed of the First Amendment claims in favor of the State of Washington and then considered the plaintiff's equal protection claim. In determining the appropriate equal protection standard, the Court said "because we hold . . . that the program is not a violation of the Free Exercise Clause . . . we apply rational-basis scrutiny to his equal protection claims." *Id.* at 721 n. 3. In *Vision Church*, the Seventh Circuit followed this clear direction and applied rational basis scrutiny as well. *Vision Church* at 1001.

Petitioner does not attempt to distinguish *Locke*, it simply ignores this binding precedent. Further, Petitioner cites no post-*Locke* case where any standard other than rational basis has been applied in a comparable situation and, with the exception of Judge Posner's 2003 *dissent* in *CLUB*, it cites no pre-*Locke* case in which heightened scrutiny was applied to an equal protection claim involving a zoning dispute between a religious institution and a municipality.

Petitioner's attempt to manufacture a conflict out of the Third Circuit's decision in *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3rd Cir. 2002), is disingenuous as that case *reversed and remanded* a lower court decision that deviated from proper rational basis analysis. In *Congregation Kol Ami,* the Third Circuit did not apply "heightened" equal protection scrutiny; it insisted that the district court apply the "highly deferential" and "very forgiving" rational basis test, *id.* at 133-37, and provided the district court with the necessary direction to carry out that inquiry. *Id.* at 137-43. Indeed, the Seventh Circuit cited *Congregation Kol Ami* with approval when it found that the Village's zoning regulations met the rational basis test. *Vision Church* at 1001.

To the extent that *Congregation Kol Ami* looked to this Court's decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), for guidance on application of the rational basis test, the Third Circuit noted that the threshold inquiry is whether the two uses, alleged to have been treated differently, are "similarly situated." *Congregation Kol Ami* at 136-38. This is essentially the same test used in "class of one" equal protection cases, *see Village of Willowbrook v. Olech,* 528 U.S. 562 (2000), and was, in fact, employed by the Seventh Circuit here. *Vision Church* at 1002. For all the reasons discussed in Section II, *supra*, Petitioner and the *public schools* were not "similarly situated."[15] Therefore, the Seventh Circuit found no need for further inquiry and found no equal protection violation. The Seventh Circuit's application of the rational basis test

[15] The same is true for the other allegedly "similar" uses offered by Vision as comparators. *Vision Church* at 1002.

in this case should not be in question, and there is no need for further review by this Court.

IV. Regardless of General Interest in RLUIPA, for All the Above Reasons, *This* Case Is Not Appropriate for Review.

The Village has no doubt that, at some point in time, the Court may find it necessary to provide guidance on RLUIPA and its application to zoning disputes. However, given the facts in this case and the soundness of the Seventh Circuit's decision, this case is not the appropriate vehicle for such an undertaking or worthy of this Court's further attention.

First, there is *no evidence of religious discrimination* in this case. As the Seventh Circuit found, the Village used its traditional zoning power to address potential impacts of large assembly facilities and passed an ordinance that regulated the location and size of *all* public assembly facilities, without regard to the religious practices occurring within the facility. *Vision Church* at 999 ("even if Vision was targeted by the Assembly Ordinance, this does not mean it was targeted *because of religion*: The [Village] was concerned about the size of the church complex and its effect on character of the Village, concerns separate and independent from the religious affiliation (or lack thereof) of the institution seeking to build on the land.") (emphasis in original).

Second, even if RLUIPA's "substantial burden" provision serves to "backstop" the Free Exercise Clause by flagging zoning ordinances and land-use decisions that effectively prevent religious worship, it is undisputed that the 55,000 sq. ft. facility allowed under the Public Assembly Ordinance

would more than amply serve Vision's current and reasonably anticipated need for worship and ministry space. Vision Church at 999-1000.

Third, while a decision clarifying RLUIPA may be of use to potential religious and governmental litigants, the same holds true for many federal statutes where clarification is desired. But there is no need to "definitively establish the legal standards by which land-use decisions are to be judged," Pet. at 29, when the various Circuits are largely in agreement on the outcome of cases with common fact patterns and have established a consistent and recognizable continuum of conduct that is, and is not, permissible under RLUIPA. This is especially true when the Village's conduct in *this case*, viewed in the context of the both the Seventh Circuit's RLUIPA cases and those of other Circuits, was, as the Seventh Circuit found, unequivocally legal and proper.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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AN ORDINANCE AMENDING THE VILLAGE CODE REGARDING PUBLIC ASSEMBLIES

2002-0-9

WHEREAS, the Plan Commission heretofore held a public hearing on March 5, 2002, pursuant to notice duly published in the **Daily Herald**, a newspaper of general circulation within the Village of Long Grove, on February 18, 2002, said publication occurring not more than thirty (30) nor less than fifteen (15) days prior to the public hearing; and

WHEREAS, the Plan Commission has issued its report and recommendation thereon to the Village Board;

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Long Grove, Lake County, Illinois, as follows:

SECTION I: the report and recommendation of the Plan Commission is accepted and approved.

SECTION II: Section 5-11-6.1 of the Village Code is hereby created as follows:

> 5-11-6.1: PUBLIC ASSEMBLIES: ***When and if permitted as a special use in the respective zoning district***, public assembly uses, such as religious institutions aquariums, libraries, museums, private schools, and other similar uses, shall conform to, in addition to all other applicable Village code provisions, the following:

	neighbor-hood facility	community facility		regional facility	
minimum acreage	3 acres	15 acres		20 acres	
where located	front on any public street	front on county or state highway		front on state highway	
maximum square feet of buildings	11,000	one building two buildings three buildings	35,000 45,000 55,000	one building two buildings three buildings	60,000 80,000 100,000
maximum cubic feet of buildings	433,600	one building - 1,034,000 two buildings - 1,231,600 three buildings - 1,472,000		one building - 1,708,000 two buildings - 2,191,000 three buildings - 2,674,000	
minimum square footage of each building		5,000		5,000	
parking	Adequate off-street parking shall be provided. All parking areas shall have interior landscaping of 1 canopy tree per 12 parking spaces. Parking shall be 1) ⅓ spaces per assembly space and 2) 3.5 spaces per 1,000 square feet of non-assembly space. These standards shall be applied to the primary use only except where a simultaneous incidental use would draw a separate set of users in which case both standards 1) and 2) shall				

	apply and be calculated separately and then aggregated. No more 115% of the required parking shall be provided. No parking shall be permitted in setback areas and parking must be screened from adjacent properties.		
parking for accessory residential use	Such residential uses are allowed a maximum of two parking spaces.		
perform-ance standards	Must conform with title 5 chapter 8 unless clearly inapplicable to assemblage activities.		
maximum lot cover-age of impervious surface including buildings	40%	25%	20%
setbacks from road	100 feet	200 feet	250 feet
side yard setback	two (2) side yards each of which shall be not less than fifty feet (50') wide and a side yard adjoining a street shall not be less than one hundred feet (100') wide.		
rear yard setback	50 feet		

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(4)

Supreme Court, U.S.
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No. 06-1497

In the Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH, AND HEE-SOO JUNG, PRESIDING BISHOP, PETITIONERS

v.

VILLAGE OF LONG GROVE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Respondent does not dispute the tremendous practical importance of the questions presented to thousands of religious congregations and municipalities nationwide, or to the United States' own RLUIPA enforcement efforts. As shown in the petition and confirmed by the *amici curiae*—denominations representing some 84 million individuals and 170,000 congregations—the "effectively impracticable" standard applied by the court below (and others) guts RLUIPA and leaves houses of worship subject to virtually unreviewable land use rulings. And so, quite apart from the conflicts in the lower courts, the need for guidance on these recurring issues of national significance warrants plenary review. See Rule 10(c).

Nothing in the opposition, moreover, undermines our showing (Pet. 11-17) that the circuits are in express conflict over the meaning of the "substantial burden" standard, that these divergent standards produce divergent results, or that application of another circuit's standard *would* have produced a different result here—especially on a motion for summary judgment by the local government. Nor does the opposition cast any doubt on the need for review of the "equal terms" and equal protection issues.

A. The "Substantial Burden" Issue.

The Village claims the conflicting decisions on the substantial burden issue are "fact-based and nuanced," and reflect only "semantic differences." Opp. 11, 15. But because no two properties (or churches' needs) are exactly alike, such decisions will *always* present factual differences. The question is whether the conflicting *legal* standards lead to different results in reasonably comparable cases. They clearly do.

1. No one can seriously dispute that this case would have come out the other way had the court below applied the Ninth or Eleventh Circuits' rules. See Pet. 14-17. In

those courts, the RLUIPA standard is not whether the state's action has "render[ed] religious exercise * * * effectively impracticable," but merely whether that action has "more than an incidental effect on religious exercise," creates "pressure that tends to force adherents to forgo religious precepts," or "impose[s] a significantly great restriction or onus upon [religious] exercise." Pet. 13. Under these more generous standards, legal maneuvering, uncertainty, delay, and the cost of repeated applications *may* be a substantial burden.

Not surprisingly, then, the Ninth Circuit has described its own standard as "more lenient" than the Seventh Circuit's "narrower definition" of substantial burden. *Guru Nanak*, 456 F.3d at 988-999. And the Eleventh Circuit has "decline[d] to adopt" the Seventh Circuit's standard because it renders the Act "meaningless." *Midrash Sephardi*, 366 F.3d at 1277.

Moreover, even assuming (as the Village argues) that other circuits consider similar factors, and that *some* of the cases would come out the same way under either standard, that does not diminish the fact that the legal standards are significantly different and would lead to different results in *many* cases, including this one.

The Village's reliance on *San Jose Christian College* v. *Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (Opp. 16), is instructive. The Village quotes a passage from that case for the proposition that the Ninth Circuit's approach is "consistent with the Seventh Circuit's." *Ibid.* In *Guru Nanak*, however, the Ninth Circuit *rejected* the view that "[*San Jose Christian*] defined the phrase 'substantial burden' by reference to the Seventh Circuit opinion in *Civil Liberties [CLUB]* that adopted a narrower definition of the phrase." 456 F.3d at 988 n. 12. Thus, when *San Jose Christian* stated that its holding was "consistent" with *CLUB*, the court meant only that "[f]ailure by San Jose Christian College to present a complete land use applica-

tion *can* fail the more lenient 'oppressive to a significantly great extent' test *as well as* the 'effectively impracticable' test. That is the consistency; *it does not mean the former case adopted the latter case's test.*" *Ibid.* (emphasis added). Thus, the Village's own authorities show that the Ninth Circuit has rejected the claim that its "substantial burden" standard is the same as the Seventh Circuit's.

2. Respondent next suggests that *Petra Presbyterian Church* v. *Village of Northbrook*, 2007 WL 1628113 (7th Cir.) (June 7, 2007), and *Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), undermine our showing of a genuine conflict. But like the decision below, *Petra Presbyterian* followed earlier decisions—including *CLUB*, which established the "effectively impracticable" test—and held that denying a church the right to locate in an industrial zone was *not* a substantial burden. 2007 WL 1628113, at *5.

City of New Berlin is no more helpful to the Village. There, the City barred a church from building on a 40-acre residential property flanked on one side by another church and on the other by land owned by a third religious body. After detailing how "[t]he repeated legal errors by the City's officials casts doubt on their good faith," the court found a substantial burden. 396 F.3d at 899. Notably, however, Judge Posner's opinion for the court did *not* expressly apply the "effectively impracticable" test from which he dissented in *CLUB*. Indeed, as he later explained in *Petra Presbyterian*, "[i]n [*City of New Berlin*] the denial was so utterly groundless as to create an inference of religious discrimination, so that the case could equally have been decided under the 'less than equal terms' provision of RLUIPA." 2007 WL 1628113, at *5. Thus, *City of New Berlin* casts no doubt on our showing (at 12) that the "effectively impracticable" test has yet to result in a finding of substantial burden.

3. The Village attempts to minimize this acknowledged conflict by suggesting that, in contrast to the land use rulings in these other cases, the Village objected only to the *size* of Vision's plan. But the Village never says it would have granted a 55,000 square-foot plan,[1] and only months earlier it had *denied* a 56,200 square-foot plan. Contrary to the Village's intimation (at 7, 15, 24), moreover, neither court below found that a smaller plan would have been approved.[2] And, on the Village's motion for summary judgment, the lower courts were obliged to resolve any conflicts in the evidence in favor of the Church.[3]

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[1] Respondent's assertion (at 6, 24-25) that a 55,000 square-foot facility "would more than meet [Vision's] current and future needs" is not supported by the record, and the district court made no such finding. In fact, Vision's expert testified (without contradiction) that, based on past growth rates, Vision would likely grow by 20% per year upon entering a larger facility, reaching 746 members by 2005 (and 1,074 members by 2007). Pl.'s Mot. Summ. J., Book of Exs., Tab 76 at 7 (Report of Dr. Rainer) ("Tab"). Vision's architect testified (also without contradiction) that a congregation with average attendance of 1,000 would need a "total area [of] 74,080 square feet." Tab 66 at 39 (Tobias). A permanent cap of 55,000 square feet—with no opportunity even to *apply* for future expansion—was therefore a significant restriction on projected growth.

[2] Indeed, the Assembly Ordinance was simply an *additional* restriction that had to be satisfied "in addition to all other applicable Village code provisions," (Opp. App. 1) including the highly discretionary special use permit considerations (Pet. App. 82a) that served as the basis for denying the 56,200 square-foot proposal months earlier—when there was *no* size restriction in the zoning ordnance. The Assembly Ordinance thus made it *less* likely that Vision could obtain Village approval.

[3] This is the complete answer to the Village's repeated claims that Vision has "distorti[ed]" the record. Opp. 2, 3 n. 1, 4 n. 2, 6, 8. In fact, each of Vision's factual statements is amply supported by the record:

More fundamentally, the Village's analysis ignores the *other* ways in which its denial substantially burdened Vision: (1) by limiting the number and types of its services; (2) by restricting its "major activity" to once a week, unless pre-approved by the Village; (3) by causing it to incur additional planning costs of some $400,000; (4) by forcibly annexing its property on the eve of the county's approval of its building plans; and (5) by creating delay and uncer-

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- For the hostility of local residents, including evidence of race-based hostility (Pet. 4; Opp. 4 n. 2), see Tab 76 at ¶ 23 (Decl. of Rev. Jang) ("[P]ublic reaction to Vision's plan was vehement and hostile."); Supp. Appx. in Support of Summ. J., Ex. D with Ex. 4 at 9 (Expert Letter of Steven Albert) ("Public inquiry on the legal issues included questions of zoning, taxes, restrictive use *and community conflict over allegations and/or denials of bias, prejudice and racism.*") (emphasis added). Moreover, DOJ's "Community Relations Service"—which has the mission of resolving "community conflicts and tensions arising from differences of race, color, and national origin"—initiated mediation in an effort to restore civility to the proceedings. DOJ-CRS Case File No. 05-0013-01 (opened Dec. 15, 2000) (http://www.usdoj.gov/crs/).
- For the statement that Vision had 300 members (Pet. 2; Opp. 3 n. 1), see Tab 76 at 7 (Decl. of Rev. Jang) ("By 2000, the church had grown to approximately 300 adult members."); Tab 74 at 5 (Report of Mr. Rainer) ("Attendance reached 300 in 2000.")
- For the discussion between the Village Manager and Rev. Jang (Pet. 3; Opp. 2-3), see Tab 76 at ¶¶ 10-15 (Decl. of Rev. Jang) ("Next Doughty and I discussed [a fourth] property, * * * [and] Doughty encouraged me that 'this is the best place to build a church in Long Grove.'").
- On whether the Assembly Ordinance was targeted at Vision (Pet. 7; Opp. 6), see, *e.g.*, Tab 71 (Internal Memorandum of Village Planner); Tab 61 at 148-49 (Deposition of Village Planner) ("Q. * * * [W]hat was discussed was they [the Village] were going [to] bring down the size of the sanctuary by reducing the maximum square footage [in the Ordinance] to 55,000 for a community facility? A. That's correct.").

tainty that have severely hampered its ability to serve its members, resulting in a much smaller church. Pet. 8. The Village offers no response to these points. But they conclusively show size is not the only issue—or even the most important one.

4. For similar reasons, the Village's attempt (at 17) to distinguish *Guru Nanak* on the ground that "there was no uncertainty about Vision's ability to locate at its preferred site if it simply complied with the specific standards contained in the Public Assembly Ordinance" is preposterous, especially given the summary-judgment posture of this case. As the Village concedes, *Guru Nanak* found a substantial burden based on the fact that, in light of the county's broad reasons for the permit denials, "any future [permit] applications * * * would be fraught with uncertainty." 456 F.3d at 990-991.

So too here. In fact, the record indicates that Vision faced even more uncertainty than Guru Nanak. Pet. 15-16. Guru Nanak faced none of the highly invasive permit conditions and overtly hostile maneuvering that Vision has faced. These hostile actions—including not only direct attempts to control Vision's religious activities, but also drastic use of the forcible annexation statute and passage of the specially targeted (and retroactively applied) Ordinance—suggested not only that future permit applications would fail, but that the Village had a strong resolve to keep Vision from ever obtaining a permit.

In sum, there is no question that the result here would have been different under the Ninth Circuit's "more lenient" definition of substantial burden—especially on a motion for summary judgment by the Village.

5. Contrary to the Village's suggestion, we have never argued that RLUIPA invalidates "'*any* regulation that inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise.'" Opp. 12.

And we agree that this reading would "render meaningless the word 'substantial.'" *Ibid.*

The same can be said, however, of a reading under which a burden is "substantial" only if it makes religious exercise "effectively impracticable." To "burden" something is to "weigh [it] down" or "overload" it—*i.e.*, to make it more difficult. See *The American Heritage Dictionary of the English Language* 247 (4th ed. 2000). To make something "impracticable," by contrast, means to make it "impossible." *Id.* at 882. Thus, while making religious practice impracticable always burdens it, the converse is not true. By assuming that it is, the Seventh Circuit's standard guts RLUIPA and directly contravenes the requirement that RLUIPA be construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(5).

6. Finally, the Village does not respond to our showing that several other courts—including the Fifth and Tenth Circuits and Washington Supreme Court—have adopted conflicting views of the meaning of "substantial burden" either prior to the Seventh Circuit's RLUIPA cases or under the Free Exercise Clause. Pet. 14, 16. Nor does the Village answer our point that the decision below conflicts with this Court's precedents on the meaning of substantial burden.[4] See Pet. 17-19. These points, however, further underscore the depth and importance of the conflict, as does the Village's acknowledgment that "other circuits have approvingly cited Seventh Circuit cases." Opp. 11.

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[4] Respondent flippantly dismisses *Sherbert*, 374 U.S. 398, and *Thomas*, 450 U.S. 707, on the ground that they are "constitutional," not statutory cases (Opp. 19 n. 11), but even the court below (along with other circuits) acknowledged that RLUIPA's "substantial burden" standard is "defined * * * by reference to" these very cases. Pet. App. 62a.

The conflict is now so deep and entrenched that only a decision by this Court can ever resolve it.

B. The "Equal Terms" Issue

On the "equal terms" issue, the Village does not dispute that, under Eleventh Circuit law, RLUIPA requires equal treatment of religious and nonreligious assemblies that have a "comparable community impact." *Konikov*, 410 F.3d at 1327. Nor does the Village disagree that Vision's proposal and the larger public school complex across the street have comparable community impacts. Thus, there can be no dispute that this case would have come out differently under the Eleventh Circuit's rule—especially on a motion for summary judgment by the government.

1. Instead of trying to reconcile the decision below with *Konikov*, the Village argues that public schools do not "fall within the class of 'nonreligious assemblies or institutions' that municipalities must treat on 'equal terms,'" and that municipalities are therefore free to treat religious institutions less favorably than public schools. Opp. 20. This may be the practical effect of the Seventh Circuit's decision—indeed, the Village's only support for its "public schools" exception to RLUIPA is the court's statement that "public schools serve a unique public function"—but it is not the law in the Eleventh Circuit or anywhere else. Nor is there any support for this view in RLUIPA's text, which applies equally to *any* "nonreligious assembly or institution," whether public or private. 42 U.S.C. § 2000cc(b)(1).

2. Recognizing that Vision and the public schools have comparable community impacts, the Village seeks (at 20-21) to justify its unequal treatment on the ground (1) that "Vision and the elementary schools were subject to different standards" because the public schools were already built when they applied for annexation and a special use permit, and (2) that the schools received approval before the Assembly Ordinance passed.

First, however, nothing in the record suggests that different zoning standards apply to structures that have already been built than those that have not, and the Village cites nothing to this effect. Opp. 21 n. 14. In fact, it is undisputed that Vision and the public schools applied for the very same relief—voluntary annexation, rezoning, and a special use permit—and that the same legal standards governed each. Pet. App. 71a.

Second, far from justifying the unequal treatment, the Assembly Ordinance heightens it. By it own terms, the Ordinance does not apply to public schools. *A fortiori*, it would have made no difference in the approval or rejection of the schools complex, and it does nothing to distinguish the schools from Vision. It merely adds to the unequal treatment: churches and private religious schools are subject to an onerous size restriction, while public schools—with an admittedly "comparable community impact"—are completely exempted. This is precisely the type of unequal treatment condemned by RLUIPA and which would have led to a different result under settled Eleventh Circuit precedent. See *Midrash*, 366 F.3d at 1231 (finding unequal treatment where clubs and lodges could locate in business districts, but religious assemblies could not).

C. The Equal Protection Issue

On the equal protection issue, the Village does not dispute the existence of a circuit split over the proper level of rational basis scrutiny applicable to land use regulations under *Cleburne*. Opp. 22. Instead, the Village curiously maintains that *Locke* v. *Davey*, 540 U.S. 712, 720 n. 3 (2004)—which involved funding of religious education, devoted three sentences to equal protection, and never mentioned *Cleburne*—addresses and resolves this split.

Locke, however, is irrelevant here. The question of heightened rational basis scrutiny was not presented, and therefore not addressed in *Locke* (even in dicta). And

Locke had nothing to do with discretionary land use regulations—the critical context not only of *Cleburne*, but of each case cited by Vision (and of the Question Presented). *Locke*, therefore, says nothing about whether courts should apply a heightened form of rational basis review to land use regulations that interfere with religious land use.

Aside from raising the red herring of *Locke*, the Village fails to address Vision's showing (confirmed by Judge Posner's dissent in *CLUB*) that, in contrast to the Seventh Circuit, the Third, Fourth, and Eighth Circuits all apply a heightened form of rational basis scrutiny to land-use regulations affecting religious land uses. Although the Village quibbles with the procedural posture of *Congregation Kol Ami*, 309 F.3d 120, observing (correctly) that the Third Circuit reversed the district court for failing to analyze whether the two uses were "similarly situated," this does not undermine the court's instruction that on remand rational basis review must be "meaningful" and alert for "animus or other improper motive," *id.* at 133, 135—unlike the Seventh Circuit's review here. And the Village does not even attempt to address the other cases cited by Vision, or Judge Posner's *CLUB* dissent, all of which confirm the existence of a circuit split on this important issue.

CONCLUSION

The Court should grant review to resolve the existing conflicts and confirm that RLUIPA and the Constitution provide substantial protection from religious discrimination operating under the guise of land-use regulation.

Respectfully submitted.

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IN THE

Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH, AND HEE-SOO JUNG, PRESIDING BISHOP,

Petitioners,

v.

VILLAGE OF LONG GROVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF BAPTIST GENERAL CONFERENCE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE FIRST CHURCH OF CHRIST, SCIENTIST, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, THE LUTHERAN CHURCH–MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, CLIFTON KIRKPATRICK, AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH, WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF BAPTIST GENERAL CONFERENCE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE FIRST CHURCH OF CHRIST, SCIENTIST, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, THE LUTHERAN CHURCH–MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, CLIFTON KIRKPATRICK, AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH, WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae Baptist General Conference, Baptist Joint Committee for Religious Liberty, The Church of Jesus Christ of Latter-day Saints, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, Evangelical Lutheran Church in America, The First Church of Christ, Scientist, General Conference of Seventh-Day Adventists, General Council on Finance and Administration of the United Methodist Church, International Church of the Foursquare Gospel, The Lutheran Church–Missouri Synod, National Association of Evangelicals, Clifton Kirkpatrick, as Stated Clerk of the Presbyterian Church (U.S.A.), United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, Worldwide Church of God as *amici curiae* in support of petitioners respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

The petitioners have granted their written consent to the filing of briefs *amici curiae*, which consent is on file with this

Court. Respondent Village of Long Grove has withheld its consent, necessitating this motion.

Amici are national religious organizations, with millions of members, that support an interpretation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), and the Free Exercise Clause of the First Amendment which provides meaningful protections for religious land uses. *Amici* are concerned that the decision below, which perpetuates an excessively high threshold for bringing RLUIPA and free exercise claims, will have adverse consequences on the ability of religious organizations to construct houses of worship and religious instruction, both for the thousands of congregations in the Seventh Circuit and for other congregations nationally. Accordingly, *amici* support the petition for a writ of certiorari.

As religious organizations whose members or affiliates depend on religious meetinghouses for the exercise of their respective religions, each of the *amici* has a direct and vital interest in the proper interpretation and application of constitutional and statutory protections for religious land uses. The specific interests of the *amici* are set forth in the addendum to this brief.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices,* 9 Geo. Mason L. Rev. 929 (2001) 3, 5

INTEREST OF THE *AMICI*[1]

The interest of the *amici* is set forth in the accompanying motion for leave to file and in the addendum to this brief.

REASONS FOR GRANTING THE PETITION

Religious organizations seeking to construct or renovate religious meetinghouses often experience unreasonable hostility and opposition from local land use bodies. Perhaps the biggest problem is land use standards that grant regulators virtually limitless discretion to reject religious land uses for wholly arbitrary or even invidious reasons, coupled with extremely deferential standards of judicial review. In response to this nationwide problem, Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), which subjects discretionary land use decisions to meaningful judicial scrutiny. *Amici* and numerous other religious land users regularly depend on RLUIPA's protections to prevent arbitrary treatment and to assist them in seeking reasonable accommodations of their worship needs from local authorities. When interpreted as the text requires and Congress intended, RLUIPA creates a strong incentive for regulators to take religious exercise seriously and to work toward practical solutions to legitimate land use concerns, rather than merely acquiescing to local opposition or barring religious uses for minor or even trivial reasons.

However, the Seventh Circuit has created such a high standard for establishing when land use decisions impose a "substantial burden" on religious exercise that the protections of RLUIPA and the Free Exercise Clause are rendered virtually meaningless. Under the Seventh Circuit's test, a

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[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

municipality has no incentive based on RLUIPA or the Free Exercise Clause to accommodate religious land uses, since it is virtually impossible to win such a claim.

The Seventh Circuit's onerous and unjustified substantial burden standard conflicts with the decisions of other circuits and lower courts, is contrary in principle to this Court's prior decisions and teachings, and violates the express intent of Congress in enacting RLUIPA. It has also had widespread adverse impacts on the ability of religious organizations to construct houses of worship. As a practical matter, whether a religious organization is subject to the Seventh Circuit's substantial burden standard (which is also applied in the Second Circuit) will predetermine the outcome of a RLUIPA or Free Exercise claim. Claims governed by that standard nearly always fail after a cursory judicial review, whereas claims subject to the more probing moderate-threshold standards used in other circuits have at least some chance of prevailing, depending on the outcome of a fact-based inquiry into the degree of actual religious hardship.

Amici urge this Court to grant the petition to resolve these conflicts and reaffirm a substantial burden test consistent with the stated purpose of RLUIPA and this Court's prior free exercise jurisprudence. For the similar reasons stated in the petition, *amici* also support petitioner's request for review of the two other issues presented in the petition, namely, the proper interpretation of RLUIPA's "equal terms" provision and the proper application of the Equal Protection Clause in religious land use disputes.

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW SEVERELY UNDERMINES VITAL STATUTORY AND CONSTITUTIONAL PROTECTIONS FOR RELIGIOUS LAND USE.

A. Discriminatory and Arbitrary Land Use Regulations Create Significant Religious Hardships.

1. No one denies that the right to worship God according to one's own conscience is fundamental. But less appreciated is the fact that for tens of millions of Americans "worship" means worship in community – in chapels, synagogues and other religious meetinghouses, in the communion and strength of fellow believers. In many faiths, vital elements of worship can be experienced only in community. A sermon or homily has little significance without an audience. Religious ceremonies and sacraments are usually performed in a communal context. Prayer meetings, Bible study sessions, and religious choirs are but a few of many examples of group worship and religious exercise. As believers worship together, religious exercise acquires meaning that transcends the individual.

The ability to erect religious meetinghouses where communities of faith may gather and worship is indispensable to religious liberty. "The physical embodiment of a religious group – its church – represents its ability to speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices* [hereinafter "Storzer & Picarello"], 9 Geo. Mason L. Rev. 929, 945 (2001). As Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. S7774 (daily ed. July 27,

2000). Our long and diverse experiences confirm the truth of that finding.

When land use regulators prohibit or significantly constrain the construction or renovation of a house of worship, they often impose considerable religious hardships. This may be because the prohibition results in people having no place to worship; in such instances, the land use regulation is effectively a direct prohibition on the free exercise of religion. But substantial religious hardship can also arise where regulatory obstacles bar the construction or expansion of a house of worship that is needed to alleviate overcrowding, reasonably accommodate new members, or enable certain religious practices. Just because it is physically possible for current and prospective adherents to cram into an existing or makeshift meetinghouse does not mean that barring a church[2] from building or expanding a house of worship creates no hardship. Overcrowding can be a severe impediment to religious exercise. Inevitably, some are denied the ability to worship with the main body of adherents, being relegated to foyers, hallways and overflow seating; many simply leave. Essential religious courses cannot be taught. Prospective members become discouraged as a congregation appears to have no room for them. Parents lack adequate space to care for restless children. The quality of services and an atmosphere conducive to worship suffer.

Similarly, the design of church buildings themselves is "freighted with religious meaning," with particular liturgies requiring particular building designs. *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 182 (Wash. 1992); *Society of Jesus of New England* v. *Boston Landmarking Comm.*, 564 N.E.2d 571, 573 (Mass. 1990). Such features as the sanctuary, altar, steeple, counseling rooms, and classrooms all

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[2] The term "church" is used inclusively to refer to religious organizations generally, whether Christian, Jewish, Muslim, Buddhist, Hindu, etc.

are critical to religious practice and expression. Activity facilities, such as a soccer field or basketball court, often play a vital role in ministering to youth. Restricting the construction or expansion of churches to preclude or impede any of these features can greatly burden religious exercise. In sum, substantial religious hardships often arise when regulators significantly constrain a church's ability to construct adequate facilities.

2. Municipal land use regulators are often hostile toward religious land uses, or at a minimum insensitive to the religious hardships just described. In the experience of these *amici*, discriminatory and arbitrary treatment of religious land uses by municipalities poses significant obstacles to religious exercise. Religious organizations of all faiths face widespread and increasing pressure by municipal authorities nationwide to limit their physical presence in America's cities and towns. *See*, *e.g.*, Storzer & Picarello, 9 Geo. Mason L. Rev. at 929.

Prior to the enactment of RLUIPA, during nine hearings over three years, Congress amassed substantial evidence of pervasive religious discrimination and violations of free exercise rights in the land use area, especially in respect to minority faiths. As summarized by Senators Kennedy and Hatch in their Joint Statement in support of RLUIPA:

> The hearing record compiled massive evidence that this right [freedom to worship] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the

> zoning board, and zoning boards use that authority in discriminatory ways.
>
> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.
>
> The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical – from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept. 9, 1999), and in Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 769-83 (1999).

146 Cong. Rec. S7774.[3]

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[3] *See also* H.R. Rep. No. 106-219, at 17-24 (1999) (summarizing hearing testimony); *see generally* Religious Liberty Protection Act of

In addition to laws with an overtly anti-religious purpose, congressional hearings uncovered many ostensibly benign land use laws that are systematically applied to reach anti-religious results. For example, a survey of twenty-nine zoning codes from suburban Chicago – where the instant case arose – indicated that in twelve of these codes churches (unlike other assembly uses) could not locate *anywhere* as of right without a special use permit, giving regulators extremely broad discretion over religious land use.[4] Witnesses repeatedly testified about regulators barring churches from worshipping in buildings previously used by non-religious assemblies and of instances where non-religious assemblies were not subject to the same restrictions.[5] Congress found that some municipalities totally exclude new churches by cleverly authorizing religious uses only in places where churches already exist. Thus, "[t]he code shows multiple sites for churches but in fact all new churches are totally excluded." Laycock, 32 U.C. Davis L. Rev. at 773-74; H.R. Rep. No. 106-219, at 19. Ironically, such regulations can leave churches worse off than adult book stores with live entertainment, which under this Court's decisions cannot be entirely excluded from a municipality. *See Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 74-75 (1981).

Congress also found, as the First Circuit has summarized, the increasingly common "phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones

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1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998).

[4] *See* H.R. Rep. No. 106-219, at 18; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); Douglas Laycock, *State RFRAs and Land Use Regulation* [hereinafter "Laycock"], 32 U.C. Davis L. Rev. 755, 773-74 (1999) (summarizing congressional record; Laycock's article was incorporated into the congressional record at 146 Cong. Rec. S7774).

[5] H.R. Rep. No. 106-219, at 19, 21, 23.

– because tax-exempt churches dampen the vibrancy of commercial development." *Boyajian* v. *Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000). Opposition to new churches in residential zones is of course familiar. For example, Congress heard about *Orthodox Minyan of Elkins Park* v. *Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. 1989). In that case the zoning board denied an application of an Orthodox Jewish congregation because the proposed building lacked parking spaces – even though such spaces were unnecessary since Orthodox Jews do not drive on the Sabbath – but then, when the congregation amended its proposal to include added spaces, the board denied the application because it would generate too much traffic! H.R. Rep. No. 106-219, at 23. However, Congress also found that "increasing numbers of the recent cases involve opposition to churches in commercial zones, or even industrial zones" because officials oppose taking such lands off the tax rolls. Laycock, 32 U.C. Davis L. Rev. at 761. The "practical effect [of this] is continuous opposition to any new places of worship, with local officials offering real or imagined or wholly phony land use concerns as a subterfuge to fight the state legislature's policy of tax exemption," resulting in "widespread political and governmental opposition to the exercise of a core First Amendment right." *Id.* at 761-62.

Independent studies have confirmed these problems and the religious hardships they impose. One study demonstrated an overwhelming, nationwide pattern of discrimination in zoning decisions involving small religious groups. *Id.* at 770-71; *see* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise*, 32 U.C. Davis L. Rev. 725, 731 (1999) (describing study showing that fully one-half to two-thirds of reported cases involve minority religions). Congress found that new, unfamiliar, and minority faiths are particularly vulnerable to unconstitutional treatment at the hands of land use regulators. *See supra* 146 Cong. Rec. S7774. Of course, every denomination is in the minority

somewhere in the country and thus vulnerable to such treatment. One survey demonstrated that arbitrary land use treatment is far more prevalent, even with respect to familiar mainline denominations, than the case law suggests, with reported cases being just the "tip of the iceberg." Laycock, 32 U.C. Davis L. Rev. at 772-73.

3. Based on their ongoing experience with numerous land use bodies across the nation, *amici* can attest that congressional concerns about religious hardships arising from discriminatory and arbitrary treatment of religious land uses are well founded. Too frequently, *amici* encounter outright anti-religious bias and discrimination, sometimes directed toward religious land uses generally and sometimes directed specifically at our particular faith communities. Occasionally that bias is overt and easily discernable, as it was in this case. But most often it is difficult to prove even when clearly present; local land use bodies are usually too sophisticated to include evidence of their own bias in the record. One court accurately noted:

> Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

American Friends of the Society of St. Pius v. *Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979). Where residential zones are at issue, *amici* have found that land use officials commonly undervalue the religious needs of churches and dramatically overvalue the minor, even trivial, concerns of neighbors who oppose anything but purely residential development or a rigid, preconceived notion of what a

"church" should be like. As the petition indicates, here the Village went so far as to insist that Petitioner build not only a "nice traditional country church," but "one like Commissioner Walter attends." Pet. at 5 (citing record). Court records rarely contain such stark evidence of religious bias, but bias is nevertheless common.

Amici can also confirm congressional findings that municipalities increasingly seek to exclude churches from commercial and industrial zones as allegedly inconsistent with their business development and tax collection agendas. In short, land use officials often fight tooth and nail to hinder the construction or expansion of much-needed houses of worship, whether in residential, commercial, or industrial districts.

B. The Decision Below Sets the Threshold for Finding a Substantial Burden So High that the Protections of RLUIPA and the Free Exercise Clause Are Often Rendered Meaningless.

In response to these types of problems, Congress unanimously passed RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA protects religious land use from discriminatory and arbitrary treatment by subjecting discretionary land use decisions that substantially burden the exercise of religion to strict scrutiny. *See id.* RLUIPA also requires that its provisions be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

RLUIPA's substantial burden test was primarily intended to weed out tenuous claims based on minor or incidental burdens that are inherent in any land use system, while still preserving a remedy for claims involving actual religious hardship. Although RLUIPA defines religious exercise to include the construction or use of a house of worship, 42

U.S.C. § 2000cc-5(7), it does not specify what qualifies as a "substantial burden" on the exercise of religion. Congress intended that term to be interpreted in accordance with this Court's past decisions. *See* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000).

The substantial burden test has a significant pedigree in this Court's free exercise jurisprudence and in other decisions applying the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. As explained in greater detail below, this Court has always defined substantial burden to include cases of actual religious hardship – where government action makes religious exercise significantly more difficult or costly. (*See infra*, Section II.C.) To be sure, the precise rubric for determining substantial burden has varied in this Court's decisions.[6] But this Court, unlike the Seventh and Second Circuits, has never conditioned judicial review under the Free Exercise Clause on the government outright barring a religious practice or making it effectively impossible; and it is clear that Congress did not intend to adopt so high a standard when it passed RLUIPA.

Nevertheless, the Seventh Circuit has established an extremely exacting substantial burden standard. It requires that the challenged land use regulation "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (hereafter "*CLUB*"); *see* Pet. App. 62a-63a (adopting *CLUB* standard). Hence, even where the burden on religious

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[6] The variety of formulations this Court has used has engendered some confusion in the lower courts. For example, the Eleventh Circuit has observed that "[t]he Court's articulation of what constitutes a 'substantial burden' has varied over time." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004). An additional benefit of certiorari is the opportunity to clarify the law in this important area.

exercise is "formidable" and "severe" (*CLUB*, 342 F.3d at 773 (Posner, J., dissenting)), under the Seventh Circuit's standard that still is not enough to constitute a substantial burden under RLUIPA unless the burden makes worship essentially impossible "within the regulated jurisdiction generally." Pet. App. 62a-63a; *CLUB* 342 F.3d at 761. Indeed, the standard adopted below is so difficult for churches to satisfy that it renders federal protections for religious land use almost meaningless, leaving churches defenseless in the face of the very arbitrariness and discrimination Congress intended RLUIPA to remedy.

For example, the Seventh Circuit's standard would preclude a RLUIPA claim against a municipality that arbitrarily mandated changes in a chapel's architecture, even if the proposed structure were fully compliant with all objective land use standards and even if the changes significantly inhibited religious worship. Under the Seventh Circuit's standard, the bare fact that parishioners could still worship in a structure whose architecture is religiously deficient would preclude any judicial review whatsoever under RLUIPA or the Free Exercise Clause. Moreover, no matter how great the religious hardship and how arbitrary the reasons, under the Seventh Circuit's standard the municipality can simply deny an application to build a house of worship as long as it leaves open at least one other place to build "within the regulated jurisdiction." Pet. App. 62a-63a; *CLUB*, 342 F.3d at 761. RLUIPA would not even be triggered. The same would be true of protections under the Free Exercise Clause. Not surprisingly, no court in the Seventh Circuit has found a substantial burden under the Seventh Circuit's interpretation of the substantial burden test.[7]

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[7] *See e.g.*, *Petra Presbyterian Church* v. *Village of Northbrook*, 409 F.Supp.2d 1001 (N.D. Ill. 2006) (no substantial burden under Seventh Circuit standard where a church prohibited from opening house of worship in one zone because churches potentially allowed in other zones); *Sisters of St. Francis Health Services, Inc.* v. *Morgan County*, 397 F.Supp.2d

The Seventh Circuit's test reduces the First Amendment's free exercise guarantee and RLUIPA's powerful safeguards against arbitrary land use regulations into an easily satisfied technicality that regulators not make a religious practice effectively impossible within an entire jurisdiction. And it precludes a RLUIPA claim based on the cost or burden imposed by unreasonable delay, no matter how substantial or even crippling it may be. The Seventh Circuit's standard thus vitiates essential protections for religious land use and will result in the abridgment of basic religious freedoms. Indeed, that standard, or its equivalent, has been adopted by a number of courts already[8] and is now routinely advanced by land use regulators seeking to avoid RLUIPA's protections.

At the local level, moreover, such a high standard destroys any incentive for land use regulators to accommodate religious exercise, as long as some opportunity for worship remains. Regulators can take the hardest line knowing that RLUIPA's powerful protections will remain out of reach.

This Court's review is necessary to address this issue of fundamental importance to religious organizations across the nation.

1032 (S.D. Ind. 2005) (no substantial burden under Seventh Circuit standard); *see also Lighthouse Institute for Evangelism, Inc.* v. *City of Long Branch*, 100 Fed.Appx. 70 (3d Cir. 2004) (unpublished decision) (same); *cf. Gerlach* v. *Brown*, 2007 WL 1659060 (D.N.J. Jun. 5, 2007) (denying prisoner RLUIPA claim under Seventh Circuit standard).

[8] *See, e.g., Ridley Park United Methodist Church* v. *Zoning Hearing Bd. Ridley Park Borough*, 920 A.2d 953 (Pa. Commw. Ct. 2007); *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (adopting similarly rigid approach).

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE INTOLERABLE CONFLICTS AND CONFUSION IN THE LOWER COURTS OVER THE MEANING OF "SUBSTANTIAL BURDEN" UNDER RLUIPA AND THE FREE EXERCISE CLAUSE.

A. The Lower Courts Are Deeply Conflicted Over What Constitutes a "Substantial Burden," with Courts Generally Divided Between High- and Medium-Threshold Standards.

Widespread confusion exists in the lower courts as to what constitutes a substantial burden on religious exercise, with standards and formulations varying greatly from case to case. Many lower courts have noted the confusion in their attempt to define the proper standard. *See, e.g.*, *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 507 (1997); *Hicks* v. *Garner*, 69 F.3d 22, 26 (5th Cir. 1995) (reviewing different approaches of the circuit courts).[9] And as *amici* can attest, confusion over the proper standard has led many religious institutions and local governments into costly litigation rather than mutually beneficial accommodations.

Generally, the lower courts are divided between high-threshold and moderate-threshold standards for satisfying the substantial burden requirement. On the high-threshold side, the Seventh Circuit holds that a regulation must "direct[ly], primar[ily], and fundamental[ly]" render religious exercise "effectively impracticable" anywhere in "the regulated jurisdiction generally." Pet. App. 62a-63a; *CLUB*, 342 F.3d

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[9] *See also, e.g., Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 326 F.Supp.2d 1140, 1152 (E.D. Cal. 2003) ("It is easy to identify these general principles [regarding substantial burden], as explained by the appellate courts; it is far more difficult to discern what they mean in the real world or apply them to real facts."), *aff'd* 456 F.3d 978 (9th Cir. 2006).

at 761. As explained, this standard is nearly impossible to satisfy in the land use context. The Second Circuit takes essentially the same approach, holding that there can be no "substantial burden" absent "coercion in religious practice, or the Church's *inability* to carry out its religious mission in its existing facilities." *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (emphasis added); *see also id.* (a law substantially burdens religious exercise only when it "denies" or "drastically restrict[s]" the "ability" to exercise religion).

On the moderate-threshold side, the Fifth, Ninth, Tenth and Eleventh Circuits and the Supreme Courts of Oregon and Washington employ more lenient and practical tests. The Eleventh Circuit in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), specifically rejected the Seventh Circuit's high-threshold standard on the ground that it would "render [RLUIPA's] total exclusion prohibition meaningless." *Id.* at 1277.[10] The court instead held that a substantial burden is one that "place[s] more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forgo religious precepts or from pressure that mandates religious conduct." *Id.* The Ninth Circuit has also rejected the Seventh Circuit's impossibility standard as too stringent. *Guru Nanak Sikh Society* v. *County of Sutter*, 456 F.3d 978, 989 n. 12 (9th Cir. 2006). In its place, the court adopted a "more lenient" (*id.*) standard where a substantial burden is one that is "'oppressive' to a 'significantly great'

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[10] RLUIPA's exclusion provision, 42 U.S.C. § 2000cc(b)(3), provides: "No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

extent," or "impose(s) a significantly great restriction or onus upon [religious] exercise." *Id.* at 988-89.

The Seventh Circuit's standard conflicts with an earlier Fifth Circuit decision under the Free Exercise Clause in which the court found a substantial burden where the municipality had merely made religious assemblies "relatively inaccessible within the city limits." *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988); *see also Adkins* v. *Kaspar*, 393 F.3d 559, 569-70 (5th Cir. 2004) (adopting similarly moderate standard under RLUIPA in claim by incarcerated persons).

The Seventh Circuit's standard also conflicts with the Tenth Circuit's definition of substantial burden under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 to -4, in *Thiry* v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996). There the court held that a substantial burden is one that has a "tendency to coerce individuals into acting contrary to their religious beliefs" or that "significantly inhibit[s] or constrain[s]," "meaningfully curtail[s]," or denies "reasonable opportunities" for religious exercise. *Id.* at 1495 (internal quotations omitted). *See also Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (rejecting Seventh Circuit standard in favor of reasoning of the Ninth and Eleventh Circuits); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992) (substantial burden arises where government action imposes a "*financial* burden on religious activity" by, for example, "grossly diminish[ing] the value of the church's principal asset") (emphasis added).

Adding to the confusion, the Seventh Circuit's standard conflicts with the decisions of many other lower courts that have adopted moderate-threshold tests.[11]

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[11] *See, e.g.*, *Wesley Spratt* v. *Rhode Island Department of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007) (declining to adopt a test for substantial burden

B. In the Religious Land Use Context, Conflicting Substantial Burden Standards Produce Different Substantive Results Even Under Closely Analogous Facts.

Because the outcome of the substantial burden analysis often determines whether a land use decision is subject to judicial scrutiny under RLUIPA or the Free Exercise Clause, conflicting standards inevitably produce conflicting outcomes in an area of the law vital to religious organizations. The petition provides a number of examples of this from the reported cases. See Pet. at 14-17. *Amici*'s own vast experience with numerous land use bodies and local courts around the country confirms the argument in the petition.

The different outcomes are driven by fundamental differences in the nature of the inquiry. Because the high-threshold standard probes only for outright preclusion, near impossibility, or some sort of drastic restriction, a simple showing of a theoretical alternative land use site (an actual, suitable alternative site is almost never available without prohibitive cost or the church would not be litigating) will generally end the analysis. The same is true if the land use body can claim that the church may be able to reapply for land use approvals under some other theory or code provision. Once the land use body shows that religious exercise is not being foreclosed, then under the high-threshold standard the

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but noting that the District Court of Rhode Island had adopted a moderate-threshold test.); *Mintz* v. *Roman Catholic Bishop of Springfield*, 424 F.Supp.2d 309 (D. Mass. 2004) (inability to alleviate crowding in rectory through additional building substantially burdens religious exercise); *Greater Bible Way Temple of Jackson* v. *City of Jackson*, 708 N.W.2d 756 (Mich. App. 2006) (church substantially burdened where other alternatives not "economically feasible"); *House of Fire Christian Church* v. *City of Clifton*, 879 A.2d 1212 (N.J. Super. App. Div. 2005) (adopting Eleventh Circuit standard); *Odneal* v. *Dretke*, 435 F.Supp.2d 608 (S.D. Tex. 2006); *City of Hope* v. *Sadsbury Township Zoning Hearing Board*, 890 A.2d 1137 (Pa. Commw. 2006) (adopting Eleventh Circuit substantial burden test).

actual burden, inconvenience, and expense to the church are deemed irrelevant – real religious hardship is beside the point.

By contrast, the moderate-threshold standard requires a more practical and disciplined analysis to determine whether the regulation imposes an actual religious hardship on the claimant, *i.e.*, whether it meaningfully curtails or makes significantly more costly religious exercise. This often requires a probing inquiry into the real circumstances and burdens facing a church. When the test severely constricts the facts a trial court may even consider in this initial inquiry – as does the Seventh Circuit's high-threshold test – religious land users have little if any chance of prevailing under RLUIPA; the result is virtually always denial of the claim. By contrast, courts applying the moderate-threshold test reach different outcomes depending on the facts of each case. *See, e.g.*, *Guru Nanak Sikh Soc'y*, 456 F.3d at 988-89 (substantial burden); *Islamic Ctr.*, 840 F.2d 298-99 (undue burden); *First Covenant*, 840 P.2d at 183-84 (impermissible burden); *Midrash Sephardi*, 366 F.3d at 1228 (no substantial burden); *Thiry*, 78 F.3d at 1495-96 (same); *Corporation of the Presiding Bishop*, 111 P.3d at 1130 (same).

In short, the doctrinal and theoretical conflicts set forth above and in the petition result in starkly conflicting outcomes in religious land use cases. Under the standard established by the Seventh and Second Circuits, a church's RLUIPA claim will nearly always fail even when a substantial religious hardship is the result of an arbitrary regulation. However, in the Fifth, Ninth, Tenth, and Eleventh Circuits, in the States of Oregon and Washington, and in various other lower courts across the nation, under identical facts, a church's showing of religious hardship will result in a successful prima facie claim under RLUIPA. This intolerable conflict, which can only be resolved by this Court, is deep and mature, and should be resolved now.

C. The High Threshold Standard Established by the Seventh Circuit Conflicts in Principle with this Court's Prior Decisions and Teachings Concerning Substantial Burden.

Lastly, this Court's prior free exercise decisions have not required that religious exercise be precluded or rendered practically impossible through direct government action to qualify as a substantial burden. Rather, the requirement has been that government action, direct or otherwise, create a real religious hardship. As explained in the petition (at 17-19), the Seventh Circuit's creation of such a strict substantial burden test in the RLUIPA context creates fundamental tension with this Court's longstanding free exercise decisions.

It is particularly noteworthy that the decision below is contrary to the key assumptions underlying this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872, 885 (1990). In *Smith*, this Court described the substantial burden requirement as one of "religious hardship," a formulation it reaffirmed in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 537 (1993) (strict scrutiny applies when a regime of "individualized exemptions" is not extended "to cases of 'religious hardship'"). Indeed, a moderate-threshold formulation of the test for substantial burden was central to the holding in *Smith*. *Smith* was based on this Court's view that, because the substantial burden test is relatively easy to satisfy, religiously neutral laws of general application must be evaluated under a more deferential test than strict scrutiny, lest the federal courts continuously be placed in the untenable position of dispensing religion-based exemptions to innumerable general laws. *Smith*, 494 U.S. at 885. It was precisely because of the moderate threshold of the substantial burden standard that this Court was reluctant to subject all neutral and generally applicable laws to strict scrutiny.

However, where strict scrutiny continues to apply – such as where laws target religion or require individualized

assessments – these concerns are not implicated. In those contexts, it makes no sense for the substantial burden test to be as strict as the Seventh Circuit's standard. In fact, the standard articulated below would turn *Smith* on its head. It makes the substantial burden requirement so onerous that even those regulations that *Smith* recognizes as subject to strict scrutiny would be effectively immune from challenge in all but the most extreme cases.

The Seventh Circuit's approach conflicts with the most basic assumptions of this Court's modern free exercise decisions. This Court should grant review to resolve this important doctrinal conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

Baptist General Conference ("BGC") is an association of 1,068 Baptist churches located throughout the United States. Many of BGC's affiliated churches are new, and many others are growing. As BGC churches have sought zoning approval for new property acquisition or the expansion of existing church sites, they have received varying responses from local governments. BGC would welcome this Court's clarification of the rights of churches under the Free Exercise Clause of the First Amendment and RLUIPA.

Baptist Joint Committee for Religious Liberty ("BJC") serves fourteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. As chair of the Coalition for the Free Exercise of Religion, BJC worked with dozens of religious and civil liberties organizations toward the passage of the Religious Land Use and Institutionalized Persons Act of 2000 and has defended its constitutionality and applicability in the courts.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over thirteen million members worldwide. Due to rapid growth, the Church has an active program for constructing temples and chapels. In the course of its building program, the Church frequently encounters the types of land use problems at issue in this case. Although many local officials work with the Church in good faith to address legitimate land use concerns, the Church often confronts arbitrary or discriminatory land use decisions. In the Church's experience, a proper interpretation of RLUIPA's substantial burden test is essential to ensure that land use regulations are administered consistent with genuine respect for religious liberty. Moreover, the Church provided testimony to Congress during hearings which led to the

enactment of RLUIPA. It has an interest in courts interpreting RLUIPA in a manner that comports with congressional intent.

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 42,000 churches and 16.3 million members. The ERLC is charged by the SBC with addressing public policies affecting the free exercise of religion, in addition to many other issues. In response to the command of Jesus Christ the Southern Baptist Convention is committed to growth through missions and evangelism. Its member congregations must build, renovate, and expand their physical properties to accommodate new worshippers and in response to the changing needs of changing cultures and communities as they seek to fulfill the Lord's command. Many Southern Baptist congregations face significant limitations to their ability to fulfill their understanding of God's mandate to them if repressive land and property use policies are imposed on them.

Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The ELCA has approximately 11,000 member congregations, which in turn have approximately 5.1 million individual members nationwide. Through the adoption of social statements by the ELCA Churchwide Assembly, the Church's highest legislative body, the ELCA adopts policy positions on issues of public importance. Through the Lutheran Office of Governmental Affairs in Washington, D.C., the ELCA engages in advocacy on public policy issues before the Congress of the United States of America. The ELCA supports an interpretation of RLUIPA that provides effective protection for religious land uses against arbitrary and discriminatory regulations.

The First Church of Christ, Scientist, in Boston Massachusetts, was founded by Mary Baker Eddy in 1879

with a healing mission that embraces humanity. It is designed to make the healing and educational system known as Christian Science available to everyone. Local Christian Science churches exist throughout the United States and in numerous other countries. The First Church of Christ, Scientist, has as part of its focus advancing and preserving religious rights for all.

General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 59,000 congregations with more than 14 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. In addition to churches and related administrative offices, the denomination runs approximately 850 elementary schools, 114 secondary schools, 14 institutions of higher learning and 35 hospitals in the United States. These institutions are in all fifty states and thousands of local towns, municipalities and counties. The Seventh-day Adventist Church has a strong interest in seeking clarification of its rights under the Religious Land Use and Institutionalized Persons Act of 2000 and the United States Constitution.

General Council on Finance and Administration of the United Methodist Church ("GCFA") is a national agency of The United Methodist Church. The United Methodist Church is one of the largest religious denominations in the United States with more than eight million members, 43,000 clergy, and 35,000 local churches. It also has more than a million members outside the United States and performs mission work in over 165 countries. Under United Methodist Church polity, GCFA is the national agency charged with protecting the legal interests of the denomination. In that role, GCFA is called on to provide advice and assistance in situations where local governments are imposing discriminatory and unreasonable burdens on the construction of United

Methodist churches. GCFA has a strong interest in this case because it concerns the power of local governments to limit the right of United Methodists to practice their religion in the communities where they live.

International Church of the Foursquare Gospel ("ICFG"), a California nonprofit corporation, was established in 1927 to propagate and disseminate the principles of Christianity embraced in the Foursquare Gospel. As a hierarchical church, the ICFG operates Foursquare Gospel churches in the United States and around the world. As of the year 2006, there were there were 1,891 Foursquare churches in the 50 states of the United States with 260,644 members and 6,772 credentialed ministers. There are over 5 million adherents worldwide attending some 49,000 Foursquare churches. ICFG, in the operations of its many churches, is a landowner and builder of church related structures in many communities across the country. In many additional communities, ICFG is a tenant user of properties owned by others. In both capacities, ICFG has been subject to and complied with local land use laws, zoning laws, and building and safety codes with increasing difficulty. Unfortunately, our experience has been that such laws are not infrequently administered in a manner which, in our view, reflects a bias against religious organizations and their activities. Consequently, as a United States based church comprised largely of American citizen congregants, ICFG is increasingly concerned for the erosion of religious liberty we perceive. Our concern and our perceived duty as citizens prompt the interest and involvement of the International Church of the Foursquare Gospel in the matter before the Court.

The Lutheran Church–Missouri Synod ("The Synod") is a nonprofit corporation organized under the laws of the State of Missouri. It is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2,500,000 baptized members. The Synod joins in this matter because it

shares the strong interest in safeguarding against arbitrary land use regulations and in preserving the protections provided under the Religious Land Use and Institutionalized Persons Act and the rights guaranteed under the First Amendment.

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and ministries in the United States. It serves 60 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and ministries. NAE believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.3 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. In their efforts to construct houses of worship, its congregations have been subjected to arbitrary and discriminatory land use regulations. This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the First Amendment. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

United House of Prayer for All People of the Church on the Rock of the Apostolic Faith is a religious organization incorporated and headquartered in Washington, D.C. with active congregations in 26 states.

Worldwide Church of God (WCG) began in the early 1930's in Eugene, Oregon. In 1947, it was incorporated in California, where it maintains its worldwide headquarters. WCG has congregations throughout the United States and affiliate churches in many foreign countries. WCG owns property at its headquarters site and in other parts of the United States. WCG has encountered in the past, and anticipates encountering in the future, conflicts with governmental officials over building codes and regulations, zoning, and related issues. WCG has a poignant interest in the preservation of the Religious Land Use and Institutionalized Persons Act in order to have a vehicle by which it can adjudicate arbitrary and capricious governmental conduct regarding the use of its properties.